92-1936

NO. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

FRANKLIN YEAGER, WALTER BRANDT, DON C. YEAGER, and MARK YEAGER,

Petitioners,

v.

CITY OF McGREGOR, McGREGOR VOLUNTEER FIRE DEPARTMENT and TOM KIRK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the provision of fire protection to the citizens and property within a municipality a traditionally exclusive governmental function so that the entity providing such function is a state actor for purposes of 42 USC §1983?

2. Can a municipality abdicate its traditional governmental function to provide fire protection to its citizens thereby insulating the municipality and the entity to which such function was abdicated from liability under 42 USC §1983?

3. Is a municipality liable for the constitutional torts of those to whom it has delegated the performance of its traditionally exclusive governmental functions, such as providing fire protection to the citizens and property within its limits?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Franklin Yeager, Walter Brandt, Don C. Yeager, and Mark Yeager, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above proceeding on January 5, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 980 F.2d 337 and is reprinted as Appendix A. The memorandum order of the District court was unreported; it is reprinted as Appendix B.

JURISDICTION

Invoking federal jurisdiction under 42 USC §1983, petitioners brought suit on November 19, 1990 against respondents in the United States District Court for the Western District of Texas. On September 26, 1991, the district court granted respondents' motions for summary judgment. Petitioners appealed the district court's order and judgment to the United States Court of Appeals for the Fifth Circuit, pursuant to 28 USC §1291.

The decision of the Court of Appeals was entered on January 5, 1993. A timely petition for rehearing was denied on February 8, 1993. *See* Appendix C.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitute provides, in relevant part:

> Congress shall make no law...abridging the freedom of speech....

2. The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

3. 42 USC §1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

a. The Action Below

At issue in this case is whether the provision of fire protection to the citizens and property within a municipality is a traditionally exclusive governmental function. If so, then it must follow that the entity to

which such function has been delegated by the municipality is a state actor for purposes of 42 USC §1983.

Petitioners' complaint in the district court alleged that respondents City of McGregor ("City") and the McGregor Volunteer Fire Department ("MVFD") violated 42 USC §1983 by discharging petitioners from the MVFD because of petitioners' exercise of their First Amendment right of free speech. Petitioners further alleged that Kirk, in his individual capacity, had conspired with the president and fire chief of the MVFD, state actors, to violate petitioners' First Amendment rights. The MVFD provided the exclusive fire protection service to the citizens of the City of McGregor.

This Court, the Court of Appeals for the Fifth Circuit, the courts of Texas, and the Texas Legislature have all previously concluded that providing fire protection is a traditionally exclusive governmental function within the limits of municipalities. Yet, inexplicably, the opinion of the Fifth Circuit panel hearing this case found the hearsay contained in the *New York Times, The Washington Times* and *Forbes* magazine to be of greater precedential value than the prior declarations of the Supreme Court of the United States,[1] ultimately concluding that, since providing fire protection within a municipality was not a traditionally exclusive governmental function, the MVFD was not a state actor

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[1] *See* Appendix A, pages 9-11.

for purposes of 42 USC §1983. Consequently, in the absence of a state actor, the panel concluded that no §1983 claim could exist against either the City of the MVFD and that, without state actors to conspire with, Kirk had no liability.

Prior to the opinion of the Fifth Circuit panel, respondents had never raised the issue that providing fire protection was not a traditionally exclusive governmental function. The district court did not reach its decision in this case based on such an assertion. The briefs in the Court of Appeals and district court are devoid of any suggestion that providing fire protection is not a traditionally exclusive governmental function. Not one word was spoken at oral argument by counsel for the parties or by members of the panel that would indicate that the question of whether providing fire protection is a traditionally exclusive governmental function was an issue in this case.

The district court, in granting respondents' respective motions for summary judgment, concluded that petitioners' public comments concerning racially discriminatory practices by and the financial affairs of the MVFD were matters of public concern. The district court also concluded, "without deciding," that the MVFD was a state actor. However, the district court granted respondents' motions for summary judgment on the following bases:

(1) City : granted on the basis that petitioners failed to show that City had exercised coercive power or significant encouragement over

MVFD's decision to terminate petitioners, ignoring the public function test expressed in *Jackson v. Metropolitan Edison Company* 419 U.S. 345, 95 S.Ct. 449, 453 (1974) and *Rendell-Baker v. Kohn* 457 U.S. 830, 102 S.Ct. 2764, 2772 (1982);

(2) MVFD : granted on the basis that the "Court does not believe the (petitioners) were dismissed for exercising their constitutional rights," ignoring the testimony of the MVFD president who testified that petitioners were terminated because of such speech; and

(3) Tom Kirk : granted on the basis of the district court wrongly concluding that, without the presence in the litigation of the individual state actors who were alleged to have conspired with him, petitioners could not succeed against Kirk in his individual capacity, in direct contradiction of *Dennis v. Sparks,* 449 U.S. 24, 101 S.Ct. 183 (1980).

After briefing and oral argument were concluded in the Court of Appeals, it was apparent that respondents' favorable judgments were in jeopardy. Consequently, in order to salvage the outcome desired

by the appellate panel, a whole new theory was concocted: providing fire protection to the inhabitants and property of a city was, for the first time, determined not to be a traditionally exclusive governmental function. Based on this new-found and pronounced statement, the Court of Appeals affirmed the judgment of the district court because "(w)here there is no state actor, no section 1983 constitutional claim exists."

B. Statement of Facts

Since approximately 1928, City has delegated its governmental responsibility to provide fire protection for its citizens to the MVFD. (Record, Vol. 4, Exhibit "1" to Plaintiffs' Response to Defendants, John Blake, Ronnie Moe Spradley, and the McGregor Volunteer Fire Department's Motion for Summary Judgment). [2] Such delegation of governmental authority continued until and after December 1, 1988. (Record, Vol. 4, Exhibit "1").

From 1928 through and after December 1, 1988, City, through a cooperative agreement with MVFD, provided the MVFD with a building, fire trucks, and

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[2] Volume 4 of the Record consists of the Motion for Summary Judgment of Blake, Spradley and Fire Department, the Brief in Support Thereof, and petitioners' Response thereto; however, the pages of Volume 4 are not numbered. Therefore, in reciting the facts herein, petitioners' record references will be to the Exhibits attached to said Response, except as otherwise noted.

equipment to fight fires within the limits of the City. (Record, Vol. 4, Exhibit "1"). City annually budgeted tax dollars to the MVFD, and, in addition, as of December 1, 1988, paid the members of the MVFD $300 per year and made regular contributions on behalf of each member of the MVFD to a state pension program. (Record, Vol. 4, Exhibit "1").

On August 19, 1965, City approved the Constitution and Bylaws of the MVFD. (Record, Vol. 4, Exhibit "2"). Such Constitution and Bylaws vested final control over the membership and members of the MVFD in the MVFD. (Record, Vol. 4, Exhibit "2"). By adoption of their Home Rule Charter, the citizens of McGregor adopted, validated, confirmed and ratified the previous actions of the City relative to the MVFD. (Record, Vol. 4, Exhibit "3").

City retained the right to approve the Fire Chief and Chief Engineer of the MVFD. City also retained the right to approve the Constitution and Bylaws of the MVFD, and any amendments thereto, before they could become effective. (Record, Vol. 4, Exhibit "2"). The members of the MVFD generally, and the Chief and Fire Marshall specifically, have been designated as the ones to enforce all provisions of the Fire Prevention and Protection Chapter of the City Code. (Record, Vol. 4, Exhibit "4"). The McGregor City Council annually budgeted tax dollars to the MVFD. (Record, Vol. 4, Exhibit "8").

In late September or early October of 1988, Jonathan R. Smith, an African-American male, sought membership in the MVFD. Mr. Smith was given an

application card which required the applicant to certify that he was "a white male, twenty-one years of age." Because of such requirement, Mr. Smith did not submit the card for consideration. (Record, Vol. 4, Exhibit "11"). Prior to petitioners' termination from the MVFD, the MVFD had never had an African-American among its membership.

On November 19, 1988, Franklin Yeager, Walter Brandt, and Don C. Yeager told a newspaper reporter that the membership application of the MVFD required applicants to certify that each applicant was "a white male, twenty-one years of age and of good moral character." Said petitioners also advised the reporter of numerous acts of racial discrimination by the MVFD. (Record, Vol. 4, Exhibit "5", p. 56, line 13 - p. 59, line 18). On November 20, 1988, the *Waco Tribune-Herald* reported petitioners' allegations of racial discrimination against the MVFD. (Record, Vol. 4, Exhibit "6").

After November 20, 1988, but prior to December 1, 1988, Blake and Spradley had both advised petitioners that Kirk, a prominent citizen of the City of McGregor,[3] wanted petitioners out of the MVFD and that Kirk would see that petitioners were removed from the MVFD if petitioners did not keep quiet concerning the allegations of racially discriminatory practices in the

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[3] Kirk was a member of the McGregor City Council, and owned the Ford automobile dealership and a restaurant in McGregor.

MVFD. (Record, Vol. 1, p. 582, line 18 - p. 581, line 13; Record, Vol. 1, p. 592, line 3 - p. 587, line 14; Record, Vol. 1, p. 582, line 18 - p. 579, line 7; and Record, Vol. 1, p. 574, line 2 - p. 572, line 17).

Kirk thought the November 20, 1988, *Waco Tribune-Herald* article in which petitioners pointed out racially discriminatory acts of the MVFD "was perhaps a disgusting bit of information to be presented through the press." (Record, Vol. 1, p. 562, lines 1 - 24). Kirk also thought that the information in said newspaper article "did not do McGregor's image any good to have this type publicity circulated on television and in the daily newspaper." (Record, Vol. 1, p. 556, line 1 - p. 555, line 4).

Prior to December 1, 1988, petitioners became aware of possible irregularities concerning the finances of the MVFD. On December 1, 1988, petitioners raised this issue at a public meeting of the McGregor City Council, and an audit of the MVFD was ordered. Members of the MVFD were present at the city council meeting and heard the statements of petitioners. (Record, Vol. 4, Exhibit "1"; and Exhibit "10", p. 55, lines 1 - 23).

On December 1, 1988, immediately *after* petitioners had advised the McGregor City council of potential irregularities in the MVFD, and immediately *before* petitioners were voted out of the MVFD, Kirk told Blake and Spradley that he, Kirk, wanted "them out of the fire department." (Record, Vol. 1, pp. 568 - 567).

After the adjournment of the City Council meeting on December 1, 1988, members of the MVFD convened for a meeting which was specially called at the conclusion of the City Council meeting. It was at this meeting that petitioners were "dismissed because they have disgraced the department by their actions." (Record, Vol. 4, Exhibit "7"). According to the president of the MVFD, a substantial or motivating factor in petitioners' dismissal was that they made public statements concerning racially discriminatory practices in the MVFD and public statements concerning the finances/financial affairs of the MVFD. (Record, Vol. 4, Exhibit "10," p. 28, line 11 p. 30, line 18; and Exhibit "9," p. 101, line 13 p. 102, line 15).

On the morning of December 2, 1988, before they had been advised that they were terminated from the MVFD, petitioners Don Yeager and Walter Brandt fought a house fire side-by-side with other members of the MVFD; said petitioners were of assistance to and not disruptive of the efforts of the MVFD to extinguish said fire. (Record, Vol. 4, Exhibit "9", p. 105, lines 13 - 19, and p. 109 lines 1 - 23). The president and chief of the MVFD, Spradley and Blake respectively, testified that petitioners were not disruptive of the operations of the MVFD. (Record, Vol. 4, Exhibit "9", p. 94, line 22 p. 96, line 1 and p. 101, line 13 p. 120, line 6; and Exhibit "12", p. 59, line 2 p. 63, line 259 and p. 93, lines 1 - 17; *see*, also, Exhibit "14", p. 14, line 16 p. 19, line 6). Petitioners were not actively seeking to replace the chief of the MVFD; such efforts were being led by the president of the MVFD, Spradley, and others. (Record, Vol. 4, Exhibit "9", p. 40, line 2 - p. 41, line 24; and Exhibit "13", p. 25, line 19 - p. 27, line 21).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Review is warranted because the Fifth Circuit's January 5, 1993 opinion is in conflict with opinions of this Court, the Fifth Circuit, and the Courts of Texas, and is in further conflict with the determination of the Texas Legislature, concerning whether the provision of fire protection within the limits of a municipality is a traditionally exclusive governmental function for purposes of state actor analysis under 42 USC §1983.

In all likelihood, the opinion of the Fifth Circuit panel in this case marks the first time in the jurisprudential history of the United States that a United States Court of Appeals has found the hearsay contained in the *New York Times, The Washington Times*, and *Forbes* magazine to be of greater precedential value than the proclamations of the United States Supreme Court.[4] This Court has consistently recognized that providing fire protection within a municipality is among the activities

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[4] *See* Appendix A, pages 6-11.

that traditionally epitomize the concerns of local, democratic self-government.[5]

The opinion of the Fifth Circuit panel ignores and conflicts with previous determinations by the Fifth Circuit that fire prevention and protection is a traditional governmental function.[6] More importantly, however, is the fact that such opinion conflicts with the Texas view toward providing fire protection within its municipalities. All Texas case authority indicates that the provision of fire protection within a municipality's

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[5] *See,* e.g., *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729 (1978); *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976); and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985) (Powell, J. dissenting).

[6] *See*, e.g., *Wilcox v. Terrytown Fifth District Volunteer Fire Department, Inc.* 897 F.2d 765 (5th Cir. 1990); *San Antonio Metropolitan Transit Authority v. McLaughlin*, 876 F.2d 441 (5th Cir. 1989); *Garcia v. San Antonio Metropolitan Transit Authority*, 838 F.2d 1411 (5th Cir. 1988); and *Peel v. Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979).

limits is a traditional governmental function of such municipality.[7]

Finally, the Texas Legislature has expressly determined that the provision of fire protection and control within a municipality is an exclusive governmental function.[8]

II.

Review is warranted because the Fifth Circuit's opinion impermissibly allows a municipality to abdicate its traditionally exclusive governmental functions to

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[7] *See*, e.g., *Genzer v. City of Mission*, 666 SW2d 116 (Tex.Civ.App. - Corpus Christi, 1983, ref. n.r.e.); *City of McAllen v. Morris*, 217 SW2d 875 (Tex.Civ.App. - San Antonio, 1948, err. ref'd); *City of Coleman v. Rhone*, 222 SW2d 646 (Tex.Civ.App. - Eastland, 1949, no writ); and *City of Houston v. Southwest Concrete Construction, Inc.*, 835 SW2d 728 (Tex.App. - Houston [14th Dist.] 1992, no writ).

[8] VTCA, Texas Civil Practice & Remedies Code, Section 101.0215. Though §101.0215 is concerned with whether sovereign immunity is waived for purposes of the Texas Tort Claims Act, VTCA, Texas Civil Practice & Remedies Code, §101.001, et seq., it is inescapable that such declaration is likewise effective in determining whether "state action" is involved in a 42 USC §1983 case such as this.

"private entities," thus allowing the municipality and the "private entity" to escape liability for the constitutional torts of the "private entity."

Although the City of McGregor was powerless to barter away its governmental responsibility under Texas law,[9] the opinion of the Fifth Circuit panel has allowed the City to escape responsibility for the constitutional torts of the entity to which it delegated its traditional governmental responsibility. Such is a dangerous precedent, especially in states such as Texas which have a history of discriminating against minorities.[10]

When the City chose to allow the MVFD to perform its traditionally exclusive governmental function within its limits, the MVFD became a state actor, and the acts of the MVFD remained the acts of the City. [11] When private groups are endowed by a city with powers and functions governmental in nature, they become agencies or instrumentalities of the city and are subject to constitutional limitations. [12] When a private entity

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[9] *City of Crosbyton v. Texas New Mexico Utilities*, 157 SW2d 418 (Tex.Civ.App. - Amarillo, 1941, ref. w.o.m.).

[10] *See* 52 CFR Part 51, Appendix.

[11] *Shelton v. City of College Station*, 754 F.2d 1251 (5th Cir. 1985).

[12] *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486 (1966).

performs a function which is traditionally the exclusive prerogative of the city, the acts of the private entity are deemed the acts of the city.[13]

A city in Texas has the responsibility for protecting its inhabitants' property against destruction by fire.[14] Providing fire protection to citizens of a city is an exclusively governmental function.[15]

This Court should grant certiorari to resolve the obvious error committed by the Fifth Circuit panel's decision in this case. Failure to do so will result in repeated attempts by municipalities to abdicate traditionally exclusive governmental functions to "private entities" which, along with the municipality acting under the opinion of the Fifth Circuit panel, will be free to abuse constitutionally protected rights and to discriminate at will.

CONCLUSION

The questions presented by this application have enormous implications concerning the availability of the United States Constitution as a shield for those whose

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[13] *Rendell-Baker*, *supra*, at 2772.

[14] *City of McAllen*, *supra*.

[15] *Genzer*, *supra*; and *Janusaitis v. Middlebury Volunteer Fire Department*, 607 F.2d 17 (2nd Cir. 1979).

rights are trampled by "private entities" to which have been delegated the traditionally exclusive governmental functions of municipalities. The Fifth Circuit panel's decision herein is clearly in error. This situation requires remedy by this Court to ensure that *equal justice under law* remains an attainable objective for all governmental employees, including volunteers.

It is submitted that petitioners' Petition should be granted.

May 7, 1993.

Respectfully submitted,

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APPENDIX A

Franklin YEAGER, Walter Brandt, Don C. Yeager and Mark Yeager, Plaintiffs-Appellants,

v.

CITY of McGREGOR, et al., Defendants-Appellees.

No. 91-8574.

United States Court of Appeals, Fifth Circuit.

Jan. 5, 1993.

Before GOLDBERG, JONES, and DeMOSS, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellants were voted out of membership in the McGregor, Texas Volunteer Fire Department (MVFD). Unwilling to let bygones be bygones, they sued the City of McGregor, MVFD and three individual defendants. From the district court's grant of summary judgment to the defendants, the former fire fighters have appealed. We affirm, principally because appellants did not raise a fact issue supporting their assertion that MVFD is a state actor or an agency of the City of McGregor. Where there is no state action, no section 1983 constitutional claim exists.

BACKGROUND

The MVFD has existed since the 1920's and has received subsidies from the City of McGregor. The City currently furnishes a building, two fire trucks and equipment to the volunteer program and pays each fireman a $300 yearly stipend plus a $10 contribution to a state pension program. Some City tax dollars are annually budgeted to MVFD, although its primary sources of revenue are donations and proceeds from the annual barbecue.

In 1965, the City of McGregor approved the Constitution and Bylaws of the MVFD as a voluntary unincorporated association. The undisputed affidavit evidence reflects, however, that the City exercised no day-to-day management or control of MVFD and, in particular, had no role in its membership decisions. The summary judgment evidence showed that the City does not approve MVFD's choice of Fire Chief or its Chief Engineer.

Appellants Franklin Yeager, Don Yeager, Mark Yeager and Walter Brandt were members of MVFD until December 1, 1988. In November of that year, Franklin Yeager, Don Yeager and Walter Brandt met with a newspaper reporter and alleged racial discrimination at the MVFD. They gave the reporter a copy of an ancient MVFD application form in which an applicant had to certify that he was "white male, 21 years of age and of good moral character." Appellants' allegations generated widespread media attention. On

December 1, appellants complained of financial improprieties concerning MVFD funds at a McGregor City Council meeting. Appellee Tom Kirk, a member of the city council and influential local businessperson, allegedly stated after the meeting, "I want them out," indicating that he wished plaintiffs to be expelled from MVFD. (Kirk and several witnesses deny that he made this statement.) Shortly after the city council meeting, the MVFD met in special session and voted overwhelmingly by secret ballot to remove the appellants from membership. At that time, former defendant John Blake was department Chief and former defendant Ronnie Spradley was President of the MVFD.

Nearly two years later, appellants filed suit in the district court alleging that they were discharged because of their public statements concerning racial discrimination and MVFD financial irregularities. They alleged a conspiracy between Councilman Kirk and MVFD officials to deprive them of First Amendment rights. Named as defendants were the City of McGregor, the MVFD, Kirk, Blake and Spradley. After conducting substantial discovery, the appellants voluntarily dismissed the MVFD officials. The remaining defendants filed separate motions for summary judgment, which the court granted. This appeal followed.

STANDARD OF REVIEW

In reviewing a district court's ruling on a motion for summary judgment this court applies the same

standard that governs the district court. *Bache v. American Telephone & Telegraph,* 840 F.2d 283, 287 (5th Cir.), *cert, denied,* 488 U.S. 888, 109 S.Ct. 219, 102 L.Ed.2d 210 (1988); *Brooks, Tarlton, Gilbert, Douglas and Kressler v. United States Fire Insurance Co., 832 F.2d 1358, 1364 (5th Cir. 1987).* We should therefore not affirm a summary judgment ruling unless we are "convinced, after an independent review of the record that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." *Brooks,* 832 F.2d at 1364. When a fact question controls the disposition of a summary judgment motion this court must "review the evidence and any inference to be drawn therein in the light most favorable to the non-moving party." *Baton Rouge Building Construction v. Jacobs Constructors,* 804 F.2d 879, 881 (5th Cir.1986) (per curiam). In contrast, we review questions of law *de novo. Kirkland v. North Side Independent School Dist.,* 890 F.2d 794, 798 (5th Cir.1989). We may affirm a summary judgment on a ground not utilized by the district court if it was raised below and has proper support in the record. *In re Jones,* 966 F.2d 169, 172 (5th. Cir.1992); *Bernhardt v. Richardson-Merrell, Inc.* 892 F.2d 440, 444 (5th Cir. 1990); *Sapp v. Renfroe,* 511 F.2d 172, 175 n. 2 (5th Cir.1975).

STATE ACTION DOCTRINE

The threshold inquiry in this section 1983 action is whether there was any intentional involvement of a state actor. *Wyatt v. Cole,* ___ U.S. _____, _____, 112 S.Ct. 1827, 1930, 118 L.Ed.2d 504 (1992); *Carey v.*

Piphus, 435 U.S. 247, 254-57, 98 S.Ct. 1042, 1047-49, 55 L.Ed.2d 252 (1978); *Jett v. Dallas Ind. School District*, 491 U.S. 701, 731, 109 S.Ct. 2702, 2720, 105 L.Ed.2d 598 (1989). Appellants have contended that MVFD and the City are state actors responsible for their expulsion from MVFD, while councilman Kirk "conspired" with MVFD officials. For reasons to be stated, we disagree with these contentions.

A. McGregor Volunteer Fire Department

The district court "assumed without deciding" that the volunteer fire department was a state actor and proceeded to the merits of the First Amendment claims. If not corrected, this assumption might be costly to the thousands of volunteer fire departments around the country that may be needlessly exposed to section 1983 lawsuits. While the district court's reluctance to wade into an area as rife with conceptualism as the state action doctrine is understandable, that alternative is less appropriate for an appellate court. On examining the question, we demur from establishing a broad rule concerning volunteer fire departments in general; but conclude that under present Supreme Court authority, cases from this circuit and Texas law, MVFD was not a state actor.

The ultimate issue in a § 1983 case is whether the alleged infringement of federal rights stemmed from conduct fairly attributable to the state. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982). While this goal is, as

Judge Goldberg has observed, "relatively well-marked," *Frazier v. Board of Trustees of Northwest Mississippi,* 765 F.2d 1278, 1283 (5th Cir.1985), the state action inquiry is inherently difficult. Judge Goldberg also wrote, "Imbued with an identity all its own, every state action inquiry partakes only slightly of the factual stuff of other cases." *Frazier,* 765 F.2d at 1284.

The Supreme Court has adopted a variety of guidelines for determining whether an individual or entity acted on behalf of the state for purposes of affixing section 1983 liability. Among the most prominent talismans of state actor status are the exclusive government function concept, the state's encouragement or coercion of private activities, the symbiotic relationship and the entanglements formula. 2. R. Rotunda, J. Nowak and J. Young, *Treatise on Constitutional Law; Substance and Procedure §* 16.2-16.4 (1986) (Supp.1991). Among these guidelines, appellants have relied solely on the "exclusive government function" standard, asserting that "a city in Texas has the responsibility for protecting its inhabitants' property against destruction by fire." Before analyzing the appellants' authorities, it is necessary to recur to the Supreme Court's explanation of the exclusive public function concept--and its limitations.

The Supreme Court rejects the notion that any entity that performs a "public function" is a state actor. The question is not "whether a private group is serving a 'public function,' [but instead] whether the function performed has been 'traditionally the *exclusive*

prerogative of the state,'" *Rendell-Baker v. Kohn,* 457 U.S. 830, 841, 102 S.Ct. 2764, 2772-73, 73 L.Ed.2d 418 (1982) (quoting *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974)). Thus, the Court held that Massachusetts' legislative decision to educate special needs high school students at public expense "in no way makes the services the exclusive province of the State." *Id.* The private school that contracted with the state to perform this function was not transformed into a state actor. With similar reasoning, the Court foreclosed a claim that nursing homes were state actors because they operated with state subsidies under requirements that the Medicaid program imposed on the state. *Blum v. Yaretsky,* 457 U.S. 991, 1012, 102 S.Ct. 2777, 2789, 73 L.Ed.2d 534 (1982). The Court has also held that neither an extensively regulated electric utility nor a warehouseman that enforced its lien by invoking a U.C.C. self-help sale provision was engaged in an exclusive public function amounting to state action. *Jackson,* 419 U.S. at 352, 95 S.Ct. at 454; *Flagg Brothers, Inc. v. Brooke,* 436 U.S. 149, 160, 98 S.Ct. 1729, 1735, 56 L.Ed.2d 185 (1978).

In dicta, the Court once mentioned fire protection among a list of traditionally exclusive public functions including education, police protection and tax collection. *Flagg Brothers,* 436 U.S. at 163-64, 98 S.Ct. at 1737. The Court then added:

> We express no view as to the extent, if any, to which a city or state might be free to delegate to private parties the performance of such

> functions and thereby avoid the strictures of the Fourteenth Amendment...[R]esolution [of such factual situations] should abide the necessity of deciding them.

Id. This self-qualifying reference does not decide the present case. First, the Court itself later determined in *Rendell-Baker* that a state educational function could be assigned to a private party under certain conditions without rendering the private school subject to § 1983. Second, to the extent that the reference in *Flagg Brothers* suggests that it would be impermissible to delegate an exclusive public function for the purpose of avoiding § 1983 liability, that underlying premise is absent from this case.[1] Finally, as *Flagg Brothers* states, the state action question remains fact specific even where the exclusivity of the public function is at issue. Lower courts must therefore consider the history, tradition and local law surrounding volunteer fire departments before concluding whether they are state actors.

Under a fact-specific review, the MVFD does not appear to perform a "power traditionally exclusively reserved to the state." *Jackson,* 419 U.S. at 352, 95 S.Ct. at 454. Texas law states that a home rule municipality,

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[1] The Court has similarly qualified *Evans v. Newton,* 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966), as establishing a narrow, fact-specific application of the public function concept. *See Flagg Brothers,* 436 U.S. at 160 n. 8, 98 S.Ct. 1735, n. 8.

the form in which the City of McGregor is organized, "may provide for a fire department." Texas Local Government Code § 342.011 (Supp.1991) (emphasis added). This language hardly sets up fire fighting as an exclusive public function, and no Texas cases hold otherwise.

Appellants rely on two cases to support the contention that fire fighting is an exclusive public function in Texas, but neither case stands for that proposition. In one of them, the state court found that members of the Mission Volunteer Fire Department served in a governmental capacity under a now-repealed state law, Tex.Rev.Civ.Ann. art. 9205, to the extent that the worked under the supervision of said employees of the local fire department. *Genzer v. City of Mission,* 666 S.W.2d 116, 120 (Tex.Civ.App.--Corpus Christi 1983, writ ref'd n.r.e.). The question in *Genzer* was not whether the Mission Volunteer Fire Department was acting in any kind of public function on its own, but was confined to considering whether its members participated in performing a public function for purposes of the Texas tort Claims Act, when they served at a fireworks display under the direct supervision of the City's fulltime employees. *Id.* There was no discussion of an "exclusive" public function. In the other cited case, the court decided simply not to limit a city's police power to re-zone in order to enhance fire protection. *City of McAllen v. Morris,* 217 S.W.2d 875 (Tex.Civ.App.--San Antonio, 1948, *err.ref'd). Morris* does state in *dicta* that "a city is one of the most ancient and familiar forms of municipal organization and it has vested in it the

responsibility for protecting its inhabitants against violence and their property against destruction by fire." 217 S.W.2d at 877. The case before us deals not with an "ancient and familiarly form of municipal organization" but with a home rule municipality governed by specific Texas Law.

This court also takes judicial notice of the fact that there are a variety of private sector fire fighting alternatives;[2] and fire fighting is not generally an

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[2] *See e.g.,* John A. Conway, *Firemen for Hire,* Forbes, December 22, 1980 at 8 (noting "a dozen private companies have taken over the job of fire protection in cities and towns around the county."); Dick Davies, *A City Considers Private Fire Service,* The New York Times, January 30, 1983 at p. 15, col. 1 (noting that for 30 years, cities in the south and southwest have used private fire companies); *Rural Metro,* Business Wire, September 3, 1987 (available on Lexis) (discussing Rural Metro Corp., a private national emergency fire fighting service which operates the equivalent of 25 fire departments throughout the United States.); Carolyn Lockhead, *Taking Cities Private,* Saturday Evening Post, May 1988 at p. 30 (noting that "many Rural Metro clients maintain full or part ownership of their fire stations and equipment."); Lori Frearson, *Company Proves Privatization Works to Contain Fires, Expenses;* Gazette, Dec. 7, 1987 at p. 23.

exclusive government function.[3] What is more, only half the population of the United States is served by exclusive government fire protection.[4] According to Martin Tolchin of the New York Times,

> "Private Fire Departments, which thrived when the nation was young, are serving a growing number of communities...about 75 communities in 15 states...have hired private companies to provide protection against fires...[one company]... protects, 20% of Arizona's population and has private fire departments in New Mexico, Texas, Florida and Tennessee."[5]

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[3] In Colonial America all firefighting was done by private volunteers. Ron Coleman, *Opportunities in Fire Protection Services* 5 (1990). In Europe the trend continues to the present day. Lucy Holdges, *Inefficient Fire Service Should be Competitive,* The Daily Telegraph (Britain) September 18, 1989 at p. 4 (noting that West Germany uses volunteer fire brigades and that in Denmark "almost half the country is served by commercial fire protection firms.")

[4] Donald DeVine, *New Look of Local Government,* The Washington Times, February 22, 1992 at B. 1 (noting "more than half the population is served by private or volunteer protection"). This is not a new trend, but a long term phenomenon. Robert Masters, *Going to Blazes* (1967) (noting that in 1967 volunteer firefighters responded to two-thirds of fires and that there were

The one federal circuit court decision that held a volunteer fire department to be a state actor pre-dates *Blum* and *Rendell-Baker* and at one point suggests that it is ruling on the "symbiotic relationship test" as well as the exclusive public function concept of state action. *Janusaitis v. Middlebury Volunteer Fire Department,* 607 F.2d 17, 23 (2d Cir. 1979).[6] Omitting the problems of archaism and ambiguity, however, *Janusaitis* is predicated on a state law difference from that of Texas:

> The Connecticut statute authorizing agreements with volunteer fire departments implicitly recognizes that fire fighting is essentially the exclusive function of government.

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eight times more volunteers than paid firemen); Ernest Ernest, *The Volunteer Fire Company Book 2* (1979) (noting that only 250,000 of the 2,000,000 firefighters in the United States were government employees.

[5] Martin Tolchin, *Localities Shift to Private Firefighters,* New York Times, July 28, 1985 at 22.

[6] Lower courts have been split in their reading of *Janusaitis* because of this ambiguity. *Krohnmuller v. West End Fire Company,* 123 F.R.D. 170, 174 (Ed.Pa.1988) (symbiotic relation); *Jensen v. Farrell Lines, Inc.*625 F.2d 379, 386 (2d Cir.1980) (same); *Lombard v. Eunice Kennedy Shriver Center for Mental Retardation,* 556 F.Supp. 677, 680 (D.Mass.1983) (exclusive government

607 F.2d at 24. Moreover, in Connecticut, volunteer fire fighters are considered employees of a municipality for workers compensation purposes, and a municipality is required to indemnify them for specific liabilities. 607 F.2d at 21. These distinctions are sufficient to render *Janusaitis* less than compelling precedent for the instant case.

As we reject appellants' reliance on the exclusive public function concept of state action,it is important to point out that MVFD would not have been deemed a state actor under any of the Supreme Court's other formulae. These formulae all depend on the degree to which the state and the regulated entity exist in a symbiotic relationship[7] or under circumstances where the conduct of the private actor can be fairly imputed as that of the state. *Jackson,* 419 U.S. at 351, 95 S.Ct. at 453; *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee,* 483 U.S. 522, 556, 107 S.Ct. 2971, 1991, 97 L.Ed.2d 427 (1987).

The Fifth Circuit has been asked to interpret this group of tests in a variety of circumstances, most pertinent of which are those involving government-funded hospitals. In the hospital cases, it has been

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function); *Wiseman v. Sherry,* 514 F.Supp. 728, 732 n. 8 (M.D.Pa.1981) (same).

[7] *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

found that even when a hospital accepts substantial governmental financial support, uses facilities constructed with government guaranteed funds, and is heavily regulated and reviewed, such a relationship is "not sufficient to subject the act of that business to the restraints of the First and Fourteenth Amendments". *McCroy v. Rapides Regional Medical Center,* 635 F.Supp. 975, 980 (W.D.La.1986) aff'd 801 F2d 396 (5th Cir. 1986).[8] Further, the court has held that "the government's acquiescence or approval [of a private entity's action is] insufficient to create government action." *Smith v. North Louisiana Medical Review Ass'n,* 735 F.2d 168, 173 (5th Cir.1984). Even when state law

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[8] *See also Greco v. Orange Memorial Hospital Corp.,* 513 F.2d 873 (5th Cir.1975), *cert. denied* 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975) (hospital that was largely funded with public bonds and whose building and lands was owned by the county was not a state actor); *Madry v. Sorel,* 558 F.2d 303 (5th Cir.1977) *cert.denied,* 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978) (hospital that received financial support and whose bylaws allow public officials to serve as ex officio members was not a state actor); *Wong v. Stripling,* 881 F.2d 200 (5th Cir.1989) (no state action where private hospital was within the purview of state legislation that authorized doctor's revocation and made available option review of procedural fairness in court system).

granted civil immunity to a peer review committee, the court has declined to find state action. *Goss v. Memorial Hospital System,* 789 F.2d 353 (5th Cir.1986.)

The only case in which this court has found state action in a hospital setting is *A.M. Jatoi v. Hurst-Euless-Bedford Hospital Authority,* 807 F.2d 1214 (5th Cir.18\987). Three factors were considered to distinguish *Jatoi, from the previous hospital cases. First, a government authority initially operated the hospital.* 807 F.2d at 1221. Further, the "Authority derived a direct financial benefit from the private lessee. The Hospital Authority's repayment of bonds it issued and the mortgages it entered into were dependent on successful operation of the hospital." *Id.*

The court also found, significantly, that the governmental authority "retained the ability to prevent or control racial discrimination by its private manager." *Id.*[9]

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[9] Absent these factors, even if a private actor receives a state financial benefit, state action will not be found. *Fulton v. Hecht,* 545 F.2d 540 (5th Cir.1977) *cert. denied* 430 U.S. 984, 97 S.Ct. 1682, 52 L.Ed.2d 379 (finding no state action even though the state of Florida regulated and shared in the business revenues of Greyhound racing against Greyhound owners). Outside the hospital setting, extensive regulation and review will not turn private action into state action. *McLellan v. Mississippi*

This case before us more closely resembles the hospital cases in which no state action was found than it does *Jatoi.* The City's operating expense subsidy and payment of token sums to fire fighters are insufficient to develop the close nexus between the City and MVFD that would convert the voluntary association's decision into state action. Unlike *Jatoi,* the City did not profit from the existence of MVFD, never operated its own fire department, and retained no ability to control MVFD. The City was not involved in MVFD's membership policies and did not "coerce or encourage" expulsion of appellants. *Cf. Blum,* 457 U.S. at 1004, 102 S.Ct. at 2786. Appellants have never suggested how the City's initial exercise of a right of approval over MVFD's constitution and bylaws (which did not permit the City to approve their amendments) results in continuing control of MVFD by the City. *See Rendell-Baker,* 457 U.S. at 842, 102 S.Ct. at 2772. We are confident that the connections between the City and MVFD are not so close as to establish the volunteer fire department's status as a state actor.

Power & Light Co., 526 F.2d 879 *vacated in part on other grounds,* 545 F.2d 919 (1977) (5th Cir.1976). Finally, absent other facts, it has been determined that if an organization is organized and incorporated under state law and receives federal and state monies, such as a private university, state action does not exist. *Blouin v. Loyola University,* 506 F.2d 20 (5th Cir.1975).

B. City of McGregor

Appellants assert two grounds for imposing liability on the City of McGregor for their expulsion from MVFD. First, they argue, because the City must provide fire protection for its residents, MVFD has fulfilled this exclusive prerogative of the City, and the City is liable for the constitutional torts of the MVFD. The previous discussion disposes of this contention. Second, appellants contend that under the principal of *Frazier* and *Monell*, the City can be held liable because of its exercise of policymaking authority over the MVFD.

In *Frazier, supra*, one of this court's cases considering a government-funded hospital's status as a state actor, it was held that a city can be found responsible for the termination decisions made by a private association only if it exercises coercive powers and provides such significant encouragement either overt or covert that choice must in law be deemed to be that of the city. *Frazier*, 765 F.2d at 1284 (citations omitted). By contrast, the district court here found "the plaintiffs have provided absolutely no summary judgment proof that the defendant city has coerced or encouraged the MVFD's action." The deposition excerpts and affidavits contained in the record fully support this finding. Appellees have cited nothing in the record which contradicts the district court's finding.

Appellants also seek to avail themselves of the *Monell*, principle that the City may be liable under § 1983 for an act consistent with official policy or custom

or an act consistent with a custom or policy of an official to whom final and complete policymaking authority has been delegated. *Monell v. Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *City of St. Louis v. Praprotnik,* 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988). Appellants urge that the final policy-making authority over the membership in the MVFD was delegated by the City to the MVFD. This doctrine is applicable, however, only if there is a delegation of *government powers.* Because the MVFD was a private association, the mayor, the city council, and the city manager of the City of McGregor did not hold, in the first instance, authority to regulate membership in the MVFD and therefore could not delegate that authority. Equally significant, the mayor and the city manager each executed an affidavit saying that neither they nor the city council had any connection with or exercised any influence over the vote to expel appellants from membership in the MVFD. The only link between the termination and a city official--however tenuous--was the alleged statement of Councilman Kirk. Appellants have not shown that Kirk is an authority holding discretion to hire and fire employees or that he individually holds full policy-making authority in the area of personnel matters. *Neubauer v. City of McAllen,* 766 F.2d 1567, 1574 (5th Cir.1985).

Since the City neither had policy-making authority over the MVFD nor exercised significant overt or covert encouragement in the termination of appellants, we uphold the court's granting of summary judgment for the City of McGregor.

COUNCILMAN KIRK

Appellants finally contend that Councilman Kirk used his position to influence the city council and certain businessmen to remove them from the MVFD. They do no allege that Kirk was a state actor in this regard but have instead relied on the presumed state actor status of John Blake and Ronnie Spradley, former officials of the MVFD, with whom Kirk allegedly conspired. Because we have determined that MVFD was not a state actor, its officers were not state actors either, and the allegations against Kirk must fall.

SUMMARY

A private association of volunteer fire fighters chose to remove four individuals from its membership after an internecine struggle. Neither the City of McGregor nor Councilman Kirk was officially involved in this decision. Because it does not appear that Texas law renders fire fighting an exclusive public function and because none of the other hallmarks of state action are present, the district court properly granted summary judgment to appellees on appellants' § 1983 claims.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

FRANKLIN YEAGER, WALTER BRANDT, DON C. YEAGER, AND MARK YEAGER,
Plaintiffs,

v.

CITY OF McGREGOR, McGREGOR VOLUNTEER FIRE DEPARTMENT, TOM KIRK, JOHN BLAKE and RONNIE MOE SPRADLEY,
Defendants.

Civil No. W-90-CA-364

ORDER

Came on this date to be considered the Defendants' Motion for Summary Judgment. Plaintiffs, former members of the McGregor Volunteer Fire Department, filed suit against Defendants City of McGregor (City); McGregor Volunteer Fire Department (V.F.D.), Tom Kirk (Kirk), a McGregor City Council member; John Blake (Blake), Fire Chief of the V.F.D.; and Ronnie Moe Spradley (Spradley), President of the V.F.D. for damages and declaratory relief under 42 U.S.C. § 1983. Plaintiffs allege that they were dismissed from the V.F.D. in retaliation for the exercise of their

rights to free speech when they publicly spoke against the V.F.D.

I. Background

On November 19, 1988, Plaintiffs Franklin Yeager, Walter Brandt and Don Yeager told a newspaper reporter that the membership application of Defendant V.F.D. required applicants to certify that each applicant was "a white male, twenty-one years of age and of good moral character." The next day the newspaper ran a story about the alleged discriminatory practices of the V.F.D. Plaintiffs also became aware of possible irregularities in the finances of the V.F.D. On December 1, 1988, Plaintiffs raised this issue at a public meeting of the McGregor City Council, and an audit was ordered. Members of the V.F.D. were present at the city council meeting and heard the statements of the Plaintiffs.

After the council meeting on December 1, 1988 was adjourned, the V.F.D. convened a meeting. At this meeting, the Plaintiffs were voted out as members of the V.F.D. Plaintiffs allege that this meeting was called by Defendants Blake and Spradley after Defendant Kirk, using his position and influence as a city council member, ordered them to do so. On December 14, 1988, Plaintiffs were notified by Defendant Spradley in his capacity as the President of Defendant V.F.D. that they had been voted out of the McGregor Volunteer Fire Department. Plaintiffs allege that the exercise of their rights to free speech was a substantial and motivating factor for their dismissal from the V.F.D. Additionally, the Plaintiffs assert that Defendants Kirk,

Blake and Spradley conspired to deprive Plaintiffs of their rights of free speech and to inhibit the exercise of their rights among other members of the V.F.D. However, Plaintiffs recently dismissed Defendants Blake and Spradley from this suit.

Defendants previously filed Motions to Dismiss. These were denied by the Court because, taking everything the Plaintiffs had alleged as true, a cause of action existed. After more discovery, Defendants' Motion for Summary Judgment present a different picture.

II. Summary Judgment

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." *Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir.1982).

In determining whether the movant has met its burden, the Court must view the evidence introduced and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. *See id.* at 1031. All reasonable doubts as to the existence of genuine issue of material fact must be resolved against the movant. *See id.* at 1031; *Jones v. Western Geophysical Co. of America*, 669 F.2d 280, 283 (5th Cir. 1982). When determining whether to grant

summary judgment, the Court is merely determining whether a factual dispute exists and is not required to resolve those disputes. *See Jones,* 669 F.2d at 283. The fact that it appears to the Court that the non-movant party is unlikely to prevail at trial or that the movant's statement of facts appears more plausible is not a reason to grant summary judgment. *See id.* at 283.

Once the movant has shown the absence of material factual issues, the opposing party has a duty to respond with any factual assertion that would preclude summary judgment. *See Kleckner v. Republic Van & Storage Co.,* 556 F.2d 766,771 (5th Cir. 1977). Rule 56(e) of the Federal Rules of Civil Procedure provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." In this respect, the burden on the non-moving party is not especially heavy; however, he must show specific facts that present a genuine issue of material fact worthy of trial rather than showing mere general allegations. *See Gossett v. Du-Ra-Kel Corp.,* 569 F.2d 869, 872 (5th Cir. 1978).

III. Discussion

A. Defendant City's Motion for Summary Judgment

To state a claim under section 1983, a Plaintiff must have suffered a deprivation of a right protected by

the constitution or federal law and such deprivation must have occurred under color of state law. *Daniels v. Williams,* 474 U.S. 327, 330-31 (1986). Defendant V.F.D. is a private unincorporated association. Therefore, to hold the City liable for a private association's decision the alleged constitutional violation must be fairly attributable to the City. *See Frazier v. Board of Trustees of Northwest Miss.,* 765 F.2d 1278, 1283-84 (5th Cir. 1985) (city must exercise coercive power or provide significant encouragement).

Citing several cases, Plaintiffs argue that the City is liable for the V.F.D.'s actions because it has delegated its responsibility for providing fire protection to the V.F.D. *See City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986); *see also Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir. 1984); *Bennett v. City of Slidell,* 728 F.2d 762, 769 (5th Cir. 1984), *cert. denied,* 472 U.S. 1016 (1985). However, these cases involve cities being sued for the actions of their employees. Municipal liability in such a case is determined by official policy. *See Webster,* 735 F.2d at 841 (decision by city's lawmakers, by official whom lawmakers have delegated policy-making authority, or widespread practice). Here, Defendant City is being sued for the alleged actions of a private association. The Court must apply the standard announced in *Frazier* to determine if the City is liable for the V.F.D.'s actions.

Plaintiffs have provided absolutely no summary judgment proof that Defendant City has coerced or encouraged the V.F.D.'s actions. Plaintiffs have alleged that Defendant to Tom Kirk, a city council member,

stated to John Blake and Ronnie Moe Spradley that he wanted the Plaintiffs out of the V.F.D. Defendant Kirk states in his deposition that he never made such a statement. the depositions and affidavits of Blake and Spradley confirm this. However, Henry Smith states in his deposition that he overheard Kirk make this statement. The depositions of the Yeagers indicate they had been told by others that Kirk was intent on removing them from the V.F.D. While this may present a fact issue regarding Defendant Kirk's involvement, it does not approach the proof necessary to impute liability to the City. Plaintiffs have pointed to no policy or widespread practice. Indeed, Plaintiffs were voted out of the V.F.D. by its own members. The city council has nothing to do with the vote. The affidavits of the Mayor and City Manager state that they and the council had no involvement with Plaintiffs' termination. The City's motion will be Granted.

B. Defendant V.F.D.'s Motion for Summary Judgment

The Court assumes without deciding that the V.F.D. is a state actor. *See Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 21-25 (2nd Cir. 1979). Next, the Court must determine whether or not Plaintiffs' speech was a matter of public concern. *See Nieto v. San Perlita Ind. School Dist.*, 894 F.2d 174, 178 (5th Cir. 1990). Plaintiffs' speech concerned the V.F.D.'s nonuse of *public* funding. The Plaintiffs' evidence establishes that they were dissatisfied because none of the money raised for the V.F.D. was ever spent. Plaintiffs are not alleging that funds were stolen. Plaintiffs also expressed concern over the V.F.D.'s policy

regarding minorities. In this regard, Plaintiffs' evidence shows that an application for the V.F.D. contained the "white male" language mentioned above and that at least one black male did not fill out an application because of this language. Defendants allege the offensive language is normally marked out. The Court has no doubt that there are matters of public concern. *See Connick v. Myers,* 461 U.S. 138, 149 n.8 (1983) (racial discrimination); *Moore v. City of Kilgore,* 877 F.2d 364, 370 (5th Cir. 1989) (administration of fire department).

Plaintiffs' interests in making such statements must be balanced against the V.F.D.'s interest in the promotion of efficient service. *See Nieto,* 894 F.2d at 179 (quoting *Pickering v. Board of Education,* 391 U.S. 563 (1968)). "This balancing is to be conducted by the court as a matter of law." *Id.* The following factors may be considered when balancing these interests: (1) was the speech likely to cause controversy and disruption, (2) would the speech impede the V.F.D.'s performance and operations, (3) would it affect working relationships, and thus, the V.F.D.'s proper functioning, (4) the time, place and manner of the activity, and (5) was the activity hostile, abusive or insubordinate. *See Brawner v. City of Richardson,* 855 F.2d 187, 192 (5th Cir. 1988); *Matherne v. Wilson,* 851 F.2d 752, 761 (5th Cir. 1988) (speech impairing discipline by superiors or harmony of workers need not be tolerated).

Plaintiffs' response to Defendant V.F.D.'s motion relies upon the fact that "two of the Plaintiffs fought a fire with other members of the MVFD *after* they were terminated but *before* they were advised of such termination," and that therefore their speech could not

have been detrimental to the V.F.D. *See Moore*, 877 F.2d at 374 (fighting fires is primary responsibility). There was overwhelming support for the removal of Plaintiffs. The vote to dismiss Plaintiffs went as follows: Walter Brandt, 14 out, 0 in; Don Yeager, 12 out, 1 in, 1 not voting; Franklin Yeager, 13 out, 1 in; and Mark Yeager, 9 out, 5 in. *See* Defendant's Exhibit 3. The affidavits and depositions supporting Defendant V.F.D.'s motion establish among other things that Plaintiffs were dissatisfied with the way the V.F.D. was run; that they criticized and argued with others and with the V.F.D.'s officers; that they wanted John Blake and other officers removed; that Plaintiffs actions impaired the V.F.D.'s morale, image and comradery; that Plaintiffs would not work within the chain of command and questioned the V.F.D. officers' authority; and that Plaintiffs' actions caused others not to trust them and caused some to consider leaving. *See* Defendant's Exhibits 1-8, 14.

The Plaintiffs' alleged disruption of the V.F.D. started long before November, 1988 when statements were made to the press. *Id.* The Plaintiffs' depositions establish that in early 1988 members of the community had been told about "the money" and that Plaintiffs were dissatisfied with the V.F.D.'s financial policies. Thus, the core issue of the Plaintiffs' statements regarding the V.F.D.'s finances was raised, publicly and privately, and caused controversy and disruption well before they were dismissed. Furthermore, the Plaintiffs were not dismissed immediately after making the statements to the press. The meeting to dismiss the Plaintiffs was not called until the next month when Plaintiffs questioned the nonuse of V.F.D. finances.

Plaintiffs do present evidence that a fire was fought after the decision to dismiss them had been made. While the Court considers this as important, the Defendants have established that Plaintiffs disrupted drills and meetings. Furthermore, according to the affidavits and depositions of several firemen, including the Plaintiffs, working relationships were affected by Plaintiffs' constant battle with the V.F.D. Thus, the ability to maintain discipline was impaired, as well as the harmony between coworkers. The Court has no doubt that hostility existed between Plaintiffs and the V.F.D.'s officers. Based upon all the evidence, the Court does not believe the Plaintiffs were dismissed for exercising their constitutional rights.

The Court does not reach this decision easily. *See Moore,* 877 F.2d at 376-77 (balancing favored plaintiff fireman). In *Moore,* the conflict was between two people -- the plaintiff and city manager. *Id.* at 373-74. Further, the City of Kilgore presented no evidence regarding the effectiveness of the fire department. *Id.* at 374-75. The Fifth Circuit viewed the fact that Moore was a fireman as inconsequential in light of the type of discipline that had been imposed. *Id.* at 374 (discipline imposed by city government on city employee). Here, the facts presented show that Plaintiffs did all they could to disrupt the V.F.D., and thus, undermine its leadership. Defendant's evidence clearly shows that several of the volunteer firemen did not trust the Plaintiffs and felt they compromised the V.F.D.'s effectiveness. The Court believes *Janusaitis* is instructive. 607 F.2d 17 (2nd Cir. 1979). Defendant V.F.D.'s motion will also be Granted.

C. Defendant Kirk's Motion for Summary Judgment

Plaintiffs state in their response to Defendant's motion that they "do not complain . . . of any legitimate legislative act of Defendant KIRK in his capacity as a member of the McGregor City Council." Plaintiffs allege that Defendant used his position and influence as a city council member to remove them from the V.F.D. Liability may not be maintained under section 1983 against a private party. *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 930 (1982). Plaintiffs have alleged that Kirk as a private party conspired with Spradley and Blake who, for purposes of this Order, are state actors. The involvement of a state actor in a conspiracy provides the state action requirement for a private party involved in such a conspiracy. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 152 (1969); *Slavin v. Curry,* 574 F.2d 1256, 1263 (5th Cir. 1978).

However, Spradley and Blake were dismissed from this suit by agreement of the parties. Thus, it appears that state action may no longer present because Kirk's alleged co-conspirators have been dismissed. A conspiracy is made up of two or more persons. More importantly, the *only* action attributed to Defendant Kirk is the statement "I want them out." Plaintiffs have failed to present summary judgment evidence that this action caused their injury. *See Bowen v. Watkins,* 669 F.2d 979, 985 (5th Cir. 1982). Plaintiffs were voted out by the V.F.D., not Kirk. Defendant Kirk allegedly made this statement to Spradley and Blake. Spradley's deposition, as well as Junior Fisher's, establishes that Spradley did not vote. Thus, only Blake's vote had an impact. Even if Blake had voted against dismissal, the majority vote

still would have removed Plaintiffs. *See id.* Defendant Kirk's motion will be Granted. Accordingly, it is

ORDERED that Defendants' Motions for Summary Judgment are **GRANTED.** It is further

ORDERED that applications for attorney's fees should be submitted in accordance with Local Rule CV-7 (j). It is further

ORDERED that this case is **DISMISSED.**

SIGNED this 26th day of September, 1991.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

C-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-8574

FRANKLIN YEAGER, WALTER BRANDT,
DON C. YEAGER and MARK YEAGER,

Plaintiffs-Appellants,

versus

CITY OF MCGREGOR, ET AL,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(February 8, 1993)

Before GOLDBERG, JONES and DEMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby **DENIED.**

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

Supreme Court, U.S
FILED
JUN 25 1993
OFFICE OF THE CLERK

No. 92-1936

In The

Supreme Court of the United States

October Term, 1992

FRANKLIN YEAGER, WALTER BRANDT, DON C. YEAGER and MARK YEAGER,

Petitioners,

vs.

CITY OF McGREGOR, McGREGOR VOLUNTEER FIRE DEPARTMENT and TOM KIRK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-1936

In The

Supreme Court of the United States

October Term, 1992

FRANKLIN YEAGER, WALTER BRANDT, DON C. YEAGER and MARK YEAGER,

Petitioners,

vs.

CITY OF McGREGOR, McGREGOR VOLUNTEER FIRE DEPARTMENT and TOM KIRK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The City of McGregor, Texas, Defendant/Appellee in the courts below, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Franklin Yeager, Walter Brandt, Don C. Yeager and Mark Yeager, and requests that this Court deny said Petition and decline to review the judgment and opinion of the

United States Court of Appeals for the Fifth Circuit that was entered on January 5, 1993.

STATEMENT OF THE CASE

A. GENERAL

1. The Petitioners assert that the City of McGregor, Texas is liable under the provisions of 42 U.S.C. § 1983 for the act of the members of a small private volunteer fire department. Petitioners were voted out of membership in the private association by the other members. This is the act of which Petitioners complain. The United States Court of Appeals for the Fifth Circuit and the United States District Court for the Western District of Texas correctly found that there existed absolutely no evidence that the City of McGregor encouraged, coerced or participated in the act of the volunteer fire department in voting the Petitioners out of membership. (Appendix A-17, B-5 to Petition for Writ of Certiorari). The Courts below further correctly held that the City had no policy making authority over the volunteer fire department and that there existed no evidence that the City Council or City Manager, who was a policy maker for personnel matters, had any connection with or exercised any influence over the vote of the volunteer fire department. (Appendix A-18, B-6 to Petition for Writ of Certiorari). The District Court further found that the Petitioners were simply not terminated for exercising any constitutional right, and that the Petitioners were disruptive and constantly argumentative regarding the day to day operation of the

volunteer fire department. It was based upon these findings that the District Court granted summary judgment in favor of the City of McGregor and the United States Court of Appeals for the Fifth Circuit affirmed such judgment.

2. The City of McGregor is a small home rule city located in rural McLennan County, Texas. The City has never created nor operated a fire department (Record, Vol. 2, p. 309) nor, under Texas Law does it have any obligation or duty to do so. Section 342.001 of the Local Government Code of the State of Texas provides that home rule city may create a fire department but places no obligation on such a city to have a municipal fire department. The City is governed by a City Council and is managed by a City Manager.

In contrast, the McGregor Volunteer Fire Department ("VFD") is a private non-profit volunteer association of private individuals. The VFD is self governing. The membership of the VFD is controlled completely by its existing members. Neither the City Council nor the management of the City of McGregor control or in any way determine who the members of the private VFD will be.

3. At no time did the City Council or City Manager of the City of McGregor discuss or consider the membership of the Petitioners in the volunteer fire department nor did they direct, coerce or encourage the VFD to vote the Petitioners out of membership. (Record, Vol. 2, pp. 310-312). The decision to revoke the membership of the Petitioners was that of the members of the VFD.

B. PETITIONERS' MISCHARACTERIZATION OF MATERIAL FACTS

The petitioners have alleged in conclusory fashion that the City has somehow "delegated" firefighting authority to the VFD. By doing so, the Petitioners attempt to vicariously attach liability to the City in an effort to make it responsible for the alleged acts of a private entity without the City having participated in such acts in any way. The City of McGregor did not delegate anything to the VFD and there is no evidence in the record to support such conclusion. The City of McGregor has at no time undertaken to provide fire service and has no obligation to do so. (Record, Vol. 2, p. 309).

Neither the Charter nor the Code of Ordinances of the City of McGregor requires or directs the VFD to submit the VFD Chief or any other officer for approval by the City, and the City does not require the VFD to submit its constitution or bylaws to the City for approval. If any document exists which indicates that the approval of the City is requested, such requirement would be only in the VFD's own documents and not pursuant to any requirement of the City. (Record, Vol. 2, pp. 310-312). It is inaccurate to represent to this Court that the City of McGregor "retained" the right to approve the constitution, bylaws or officers of the VFD. Such authority was never the City's and it never took any act to "retain" any such responsibility.

The City paid a token stipend to members of the VFD to show its appreciation for their efforts. In addition, the City paid $10.00 per year to a State pension program. Any

other assertion regarding the City budget is not supported by any competent or admissible evidence in this record. Further, the City at no time ordered an audit of the VFD, but did offer to assist the VFD by making its accountant available to review VFD records. However, it was determined that the City could not expend public funds to investigate any alleged financial issue relating to the VFD since the VFD was a private entity. (Record, Vol. 1, p. 629-632). Petitioners' assertion that the VFD was designated to enforce the City's fire code is wrong and there is no evidence in this record to support that assertion. There is nothing in the Charter or the Code of Ordinances of the City of McGregor which indicates that any person performing any function on behalf of the City is required to be a member of the VFD.

The undisputed evidence shows clearly that the City exercised no management or control over the VFD and had no role in the VFD membership decisions. Such decisions were made by the private VFD members.

ARGUMENT FOR DENYING PETITION FOR WRIT OF CERTIORARI

I.

The opinion of the Fifth Circuit Court of Appeals relative to Petitioners' action against the City of McGregor is not in conflict with any previous opinion of this Court, the Fifth Circuit Court of Appeals nor the laws of the State of Texas. Such decision is well grounded in fact and is law. It has been consistently held that a city government cannot be liable under 42 U.S.C. § 1983 for

the act of a private organization unless the city has acted to exercise coercive power on the private entity forcing the private group to deprive a person of a protected right or has significantly encouraged the private entity to deprive a person of such right. *Frazier v. Board of Trustees,* 765 F.2d 1278, 1283-84, or rehearing 777 F.2d 329 (5th Cir. 1985). The active participation of the city must be to the degree that the choice to deprive a person of rights must be deemed to be that of the City. *Ezpeleta v. Sisters of Mercy,* 800 F.2d 119 (7th Cir. 1986), *Hinman v. Lincoln Towing Service, Inc.,* 771 F.2d 189 (7th Cir. 1985), *Frazier,* supra. There was no evidence whatsoever that the City coerced or in any way participated in the act of which the Petitioners complain.

Likewise, the holding of the Fifth Circuit that the act of voting the members out of the VFD was not pursuant to a custom or policy of the City of McGregor is fully consistent with earlier opinions of this Court and of the Fifth Circuit Court of Appeals.[1] As the Fifth Circuit found, there was no connection between the City and the act complained of. The Charter of the City of McGregor made the City Manager responsible for the proper administration of all affairs of the City and provided no authorization or means for delegation of City personnel policy making authority to any other person or entity. (Record, Vol. 2, pp. 320-321). Similarly, the City Council of the City of McGregor adopted an ordinance (Section 2-6 City

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[1] See *Monell v. Dept. of Social Services,* 436 U.S. 658, 93 S.Ct. 2018, 56 L.Ed.2d 611 (1978), *City of St. Louis v. Praprotnik,* 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988), *Neubauer v. City of McAllen,* 766 F.2d 1576, 1574 (5th Cir. 1985).

Code) which specifically designated the City Manager as Chief Executive Officer of the City responsible for the administration of all affairs in the City. (Record, Vol. 2, p. 319). The City Manager therefore is the only person to whom relevant policy making authority has been delegated. The uncontroverted summary judgment evidence shows that the City Manager played no part in the removal of the Petitioners from the VFD and, in fact, the Petitioners acknowledge that the City Manager did not take part in that process. (Record, Vol. 3, p. 4-5). No person holding authority in the area of personnel matters of the City participated in any way in the decision to remove the Petitioners and no such person could have done so because of the private nature of the VFD. (Record, Vol. 2, pp. 310-312).

Section 342.001 of the Texas Local Government Code makes it clear that a City such as McGregor may provide for a fire department but does not require the same. Consistently, no Texas cases set up firefighting as some sort of exclusive governmental function. To the contrary, as noted by the Fifth Circuit Court of Appeals, firefighting is far from an exclusive governmental function with private and volunteer fire departments providing services throughout the State and Country. (Appendix A-10,11 to Petition for Writ of Certiorari). The Texas cases cited by Petitioners relative to firefighting as a government function[2] stand only for the proposition that under

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[2] *Genzer v. City of Mission*, 666 S.W.2d 116 (Tex. Civ. App. – Corpus Christi, 1983, ref. n.r.e.); *City of McAllen v. Morris*, 217 S.W.2d 875 (Tex. Civ. App. – San Antonio, 1948, err. ref'd.); *City of Coleman v. Rhone*, 222 S.W.2d 646 (Tex. Civ. App. – Eastland,

fact specific situations the exercise of fire protection power is not inconsistent with the police power authority of a City.

Further, Section 101.0125 of the Texas Civil Practice and Remedies Code is neither determinative nor particularly relevant to the issue of state action. Because the City of McGregor had no involvement whatsoever in the act of which Petitioners complain, for the reasons shown above, the language of Section 101.0125 can only be relevant to the issue of whether 42 U.S.C. § 1983 applies to the VFD. Section 101.0125 is not any express determination that the activities set forth therein are exclusive governmental functions. To accept that position would be to accept that every hospital, cemetery and recreation facility in the State of Texas is subject to the provisions of 42 U.S.C. § 1983. Clearly that is not the case. Section 101.0125 simply states that a governmental entity undertaking to perform acts described therein has immunity from tort liability relating to such activity because such activity is not inconsistent with the police power authority of a City.

None of the Fifth Circuit holdings cited by the Petitioners[3] support the position that the City of McGregor

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1949, no writ); and *City of Houston v. Southwest Concrete Construction, Inc.* 835 S.W.2d 728 (Tex. App. – Houston [14th Dist.] 1992, no writ).

[3] *Wilcox v. Terrytown Fifth District Volunteer Fire Department, Inc.*, 897 F.2d 765 (5th Cir. 1990); *San Antonio Metropolitan Transit Authority v. McLaughlin*, 876 F.2d 441 (5th Cir. 1989); *Garcia v. San Antonio Metropolitan Transit Authority*, 838 F.2d 1411 (5th Cir. 1988); and *Peel v. Florida Department of Transportaton*, 600 F.2d 1070 (5th Cir. 1979).

might be responsible or liable for the acts of the private VFD. Additionally, none of those cases relates to 42 U.S.C. § 1983 and none holds that fire protection is an exclusively governmental function.

II.

The Fifth Circuit correctly analyzed the relationship between the City of McGregor and the private volunteer fire department. There is no factual or legal support whatsoever for the proposition of Petitioners that the City of McGregor somehow delegated anything to the VFD. To the contrary, the record clearly shows that the City never undertook to provide fire protection, that Texas law does not require the City to do so and that the City did not delegate any authority to the VFD. (Record, Vol. 2, pp. 309, 310-312, Sec. 342.001 Tex. Local Govt. Code). Further, as pointed out in the Fifth Circuit opinion, since the VFD was a private association, the City did not hold, in the first instance, authority to regulate membership in the VFD and therefore could not have delegated that authority to them. (Appendix-A-18 to Petition for Writ of Certiorari). In short, there was no delegation and the City never undertook anything to delegate.

There is simply no legal or factual basis for holding the City vicariously liable for an alleged act of the VFD in which the City had no involvement. The cases of *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486 (1966), *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764 (1982), and *Janusaitis v. Middlebury Volunteer Fire Department*, 607 F.2d 17 (2nd Cir. 1979), do not address the issue of liability of a governmental entity for the acts of a private entity. Rather, these

cases address the question of whether the private organization itself can be liable under 42 U.S.C. § 1983 by virtue of the function it performs. Nothing in those cases would subject the City of McGregor to liability for the act of the private VFD.

Further, Petitioners clearly mischaracterize the opinion in the case of *Shelton v. City of College Station*, 754 F.2d 1251 (5th Cir. 1985). The *Shelton* case does not support the incorrect assertion that the act of the VFD is the act of the City of McGregor. In *Shelton*, the Plaintiff complained that he had applied for a variance from the City of College Station's Zoning Board of Adjustment ("ZBA") and that such variance had been improperly denied. The Court found that the ZBA was specifically created by the City by ordinance pursuant to a state statute for a quasi judicial purpose of resolving issues related to the City's zoning ordinances, that all its members were appointed directly by the City Council, that the ZBA could grant variances to the City's zoning ordinances and that the ZBA could only act on those zoning matters designated by the City Council. Based on those specific conditions, the Court found that the ZBA was a policymaker of the City. The Court did not create any new exception to the requirement that a cause of action may exist against the City only in case of coercion of a private entity or for the act or policy of its governing body or some official policy maker. Further, there is nothing in this record or before this Honorable Court which would establish that the act of the members of the VFD was an official act or policy of the City of McGregor.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit correctly affirmed the judgment of the United States District Court for the Western District of Texas entered in this cause. The Fifth Circuit Court of Appeals correctly applied existing law and did so in a manner fully consistent with the opinions of this Court and the Fifth Circuit, as well as the laws of the State of Texas. Accordingly, Respondent, City of McGregor, Texas, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari filed by Franklin Yeager, Walter Brandt, Don C. Yeager and Mark Yeager.

Dated this the 25th day of June, 1993.

Respectfully submitted,

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No. 92-1936

In The

Supreme Court of the United States

October Term, 1992

FRANKLIN YEAGER, WALTER BRANDT, DON C. YEAGER, and MARK YEAGER,

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-1936

In The

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v.

CITY OF McGREGOR, McGREGOR VOLUNTEER FIRE DEPARTMENT, and TOM KIRK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The McGregor Volunteer Fire Department, Defendant/Appellee in the courts below, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Franklin Yeager, Walter Brandt, Don C. Yeager and Mark Yeager ("the Petitioners"), and requests that this Court deny the petition and decline to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit that was entered on January 5, 1993.

STATEMENT OF THE CASE

McGregor Volunteer Fire Department ("the MVFD"), a private volunteer organization formed in 1920, operates in the city of McGregor, Texas, and the surrounding rural area. Individual volunteers comprise the MVFD's membership, and the group is primarily funded through voluntary donations and an annual charity barbecue. *(R. Vol. 4, MVFD Exhibits 1 and 2).*[1] Essentially, the MVFD is an informal association of individual volunteers.

The City of McGregor, Texas, is a home-rule municipality. *(R. Vol. 2 at 524).* At no time during its existence has the City created or operated a municipal fire department. *(R. Vol. 2 at 309).* The City of McGregor is not obligated under Texas law to provide fire service; instead, Section 342.011 of the Texas Local Government Code provides that a home-rule municipality *may* create a fire department. *(R. Vol. 1 at 624).* The City did not, and as a matter of law, could not, delegate fire fighting services to the MVFD, and the Fifth Circuit correctly held that the MVFD was not a state actor.

A. Statement of Facts

Prior to December 1, 1988, Franklin Yeager, Walter Brandt, Don C. Yeager and Mark Yeager were members of

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[1] Volume 4 of the Transcript consists of the Motions for Summary Judgment of Defendants Blake, Spradley and the MVFD, the Brief in Support of the Motion, and Petitioners' Response to the Motion. The pages of Volume 4 were not numbered. References to Volume 4 of the Transcript will specify the document referred to and, if necessary, the exhibit number to the document.

the MVFD. During the time that the Petitioners were members of the organization, they generated friction within the department and pursued a personal vendetta against certain officers of the MVFD. *(R. Vol. 4, MVFD Exhibits 1 through 6).* Within the department, morale decreased and discipline grew slack, a condition most members attributed directly to the presence and conduct of the Petitioners. *(R. Vol. 4, MVFD Exhibits 1 through 6).* Finally, on December 1, 1988, with a quorum present, MVFD members voted by secret ballot to withdraw the Petitioners' membership in the department. *(R. Vol. 4, MVFD Exhibit 3).*

During the many months before the vote revoking the Petitioners' memberships, the Yeagers and Brandt had been involved in a systematic campaign to disrupt and discredit the functioning of the department. Their tactics ranged from constant criticism of the leadership, to snickering and jeering during meetings, to wholesale disruption of drills such that the department could no longer hold meaningful practice exercises. *(R. Vol. 4, MVFD Exhibits 1 through 6).* Additionally, Petitioners criticized the way the department spent the money raised through the annual barbecue. *(R. Vol. 4, MVFD Exhibits 1 through 6).* And, although at that time the MVFD had some minorities among its membership, three of the Petitioners met with a reporter from a local newspaper and informed him of alleged racial discrimination within the department. *(R. Vol. 4, Yeagers' Exhibit 5; MVFD Exhibits 1 and 2).* About a month later, the Petitioners again publicly criticized the MVFD, renewing their unfounded allegations of financial improprieties within the department during a

meeting of the McGregor City Council. *(R. Vol. 4, MVFD Exhibit 1).*

After discipline, operations, and morale fell to an all time low within the membership, seven of the department's members requested a specially called meeting of the MVFD on December 1, 1988. *(R. Vol. 4, MVFD Exhibits 1, 2).* With a quorum of 15 present, and with Spradley, the president, abstaining, the overwhelming majority of the membership voted to remove the Yeagers and Brandt from the volunteer organization. *(R. Vol. 4, MVFD Exhibit 3).*

B. Course of Proceedings and Disposition of the Case

The Yeagers and Brandt filed their complaint in November of 1990 in the United States District Court for the Western District of Texas, against the City of McGregor, Texas, the MVFD, Tom Kirk, John Blake and Ronnie Moe Spradley.[2] The Petitioners alleged that they were voted out as members of the MVFD in retaliation for the public comments they made regarding alleged racial discrimination and financial improprieties within the MVFD, and that the vote to remove them from membership violated their First Amendment rights to free speech.

The district court granted the Defendants' Motions for Summary Judgment, concluding that: 1) there was no summary judgment evidence that the City of McGregor

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[2] John Blake, fire chief of the MVFD and Ronnie Moe Spradley, President of the MVFD, were dismissed from the lawsuit by the agreement of the parties. *Petitioners' Appendix B at 10.*

coerced or encouraged the actions of the MVFD's membership, and therefore the organization's actions could not be fairly attributed to the City *(Petitioners' Exhibit B at 5)*; 2) the uncontroverted summary judgment evidence established that the MVFD's interest in the promotion of efficient service, balanced against the Petitioners' First Amendment interests in making statements of public concerns, weighed in favor of the MVFD *(Petitioners' Exhibit B at 6-9)*; and 3) the summary judgment evidence failed to establish that any action of Kirk caused the Petitioners any injury, and no state action was present because the remainder of the alleged co-conspirators had been dismissed from the lawsuit. *(Petitioners' Exhibit B at 10-11)*.

The Yeagers and Brandt appealed to the Fifth Circuit, which affirmed the summary judgments on the basis that no state action was implicated by the vote of a private association of volunteer fire fighters to remove four individuals from its membership. *(Petitioners' Exhibit A at 19)*.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Review by writ of certiorari is not warranted because the Fifth Circuit's opinion does not: 1) conflict with prior decisions of the Fifth Circuit; 2) decide a federal question in conflict with any applicable decision of this Court or the Texas Supreme Court; 3) so far depart from the accepted and usual course of judicial proceedings or sanctions as to call for the exercise of this Court's power of supervision; 4) decide an important question of federal law which has not been, but should be, settled by this Court; or 5) in any other way present an issue of sufficient merit or importance as to invoke this Court's power of discretionary review. Instead, the Fifth Circuit correctly affirmed the judgment of the district court and held that the MVFD was not a state actor.

ARGUMENT

A. Inaccuracies in the Petition for Writ of Certiorari

The Petition for Writ of Certiorari misstates or mischaracterizes both the law and the facts of this case in several important ways. First, the petition mischaracterizes the opinion of the Fifth Circuit. Contrary to Petitioners' claim, the Fifth Circuit did not *base* its opinion upon statements quoted from magazines and newspapers, but instead, in a well-reasoned and legally sound opinion, concluded from its review of cases from this Court, prior Fifth Circuit law, and Texas law that the MVFD was not a state actor. Petitioners' broad-stroke dismissal of the Fifth Circuit's opinion as being premised

solely upon "hearsay" is grossly inaccurate and mischaracterizes the Fifth Circuit's analysis supporting its opinion.

Second, in attempting to posture their case for discretionary review with this Court, Petitioners claim that the Fifth Circuit's opinion "ignores and conflicts" with prior Fifth Circuit opinions and Texas law. As discussed in greater detail below, no judicial or legislative body has ever decreed that fire prevention and protection is an *exclusive* governmental function of Texas municipalities. The City of McGregor has never undertaken the responsibility to operate a municipal fire department, nor has it acted to *delegate* that activity to any entity, including the MVFD. The City could not delegate a function which it did not otherwise have the legal obligation to perform.

Third, Petitioners inaccurately state that no defendant raised the issue that providing fire protection was not a traditionally exclusive governmental function at the trial court level or in their appellate briefs. In a Motion to Dismiss under Federal Rules of Civil Procedure 12(b) which was overruled by the district court, the MVFD asserted that it was not a state actor. *(R. at 31-32; 150-60).* The City's appellate brief to the Fifth Circuit specifically addressed the issue. *(Brief of Appellee City of McGregor at 2).* The MVFD expressly adopted the City's argument. *(Brief of Appellee McGregor Volunteer Fire Department at 7, n. 2).* The issue of state action did not arise in a vacuum during the drafting of the panel's opinion.

Fourth, Petitioners incorrectly state that the district court "concluded, without deciding" that the MVFD was

a state actor. Actually, the lower court stated that it "*assumes* without deciding that the V.F.D. is a state actor." *(Petitioners' Exhibit B at 6)* (emphasis added). It was this assumption concerning the threshold inquiry – whether there was any involvement of a state actor – that prompted the Fifth Circuit's lengthy analysis, since they feared that the uncorrected assumption might needlessly expose other volunteer fire departments around the country to Section 1983 lawsuits. *(Petitioners' Exhibit A at 5).*

Finally, the Petitioners inaccurately characterize the Fifth Circuit's opinion as one having "enormous implications" that would somehow shield those whose rights are trampled by " 'private entities' to which have been delegated the traditionally exclusive governmental functions of municipalities." Yet the panel's opinion clearly limited the scope of the decision to the MVFD particularly, saying: "On examining the question, we demur from establishing a broad rule concerning volunteer fire departments in general; but conclude that under present Supreme Court authority, cases from this circuit and Texas law, MVFD was not a state actor." *(Petitioners' Exhibit A at 5).* And later, the Court reiterated that "under a *fact-specific* review, the MVFD does not appear to perform a 'power traditionally exclusively reserved to the state.' " *(Petitioners' Exhibit A at 8)* (emphasis added). The opinion clearly limits the scope of its application and the Petitioners' fears are unfounded.

B. Review is Not Warranted In This Case Because The Opinion of the Fifth Circuit Was Correctly Decided

The Fifth Circuit's opinion in this case focuses upon the fundamental inquiry in any §1983 case – whether the alleged infringement of a constitutional right arose from conduct fairly attributable to the state. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482, 496 (1982). Absent the involvement of a state actor, no wrong capable of redress under §1983 occurred.

Petitioners argue that the provision of fire protection to the citizens of the City of McGregor is an "exclusive government function" and that the MVFD performed the services only through the delegation of that function from the City. However, as the Fifth Circuit noted, the relevant inquiry is not whether a private group serves a public function, but whether that particular function is exclusively "the prerogative of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 2772, 73 L.Ed.2d 418, 428 (1982) (*quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477, 485 (1974)).

1. Prior Authority From This Court

Contrary to the Petitioners' assertions otherwise, this Court has not determined that the provision of fire protection is an exclusive governmental function of a municipality. Petitioners cite *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978); *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49

L.Ed.2d 245 (1976); and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (Powell, J. dissenting) as supporting authority. *Garcia* rejected the "*traditional* government function" rule of state immunity from FLSA wage and over-time regulations and overruled *National League of Cities*. 469 U.S. at 557. Neither *Garcia* nor *National League of Cities* defined fire protection as an *exclusive* governmental function; instead this Court noted that fire protection is an activity that is *traditionally* carried on by governmental entities. *See, e.g., National League of Cities*, 426 U.S. at 851 ("These activities [fire prevention, police protection, sanitation, public health and parks and recreation] are typical of those performed by state and local governments . . . ") *and* 855 ("[fire protection] provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens.")

This Court's discussion in *Flagg Brothers* did center around the governmental functions "exclusively reserved to the State," but in the context of a state's alleged delegation of the power to resolve private disputes. *436 U.S. at 157*. Fire protection services were discussed only as an example of other areas of state and municipal functions.

As this Court observed in *Flagg Brothers*, the state action question is situationally specific and courts must review the history, tradition and local law surrounding the particular activity to determine whether the defendant is a state actor. *436 U.S. at 163-64*. That is precisely what the Fifth Circuit did in this case, concluding that under the fact-specific review, the MVFD "does not appear to perform a 'power traditionally exclusively

reserved to the state.' " *(Petitioners' Exhibit A at 8, citing Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477, 485 (1974)).

2. Texas Law

Nothing in Texas law requires the City of McGregor, a home-rule municipality, to provide fire protection to its citizens; instead, the authorizing statute states that "A home-rule municipality *may* provide for a fire department." *Tex. Loc. Gov't Code Ann. §342.011* (Vernon 1988). The Texas legislature's choice of permissive language must be given its normal meaning. *Tex. Gov't Code Ann. §312.002* (Vernon 1988).

This result is not altered by the language of §101.0215 of the Texas Civil Practice & Remedies Code, contrary to Petitioners' assertions. Section 101.0215 provides an illustrative list of functions which may form the basis of governmental liability under the Texas Torts Claims Act, as long as the activity falls within the parameters of the three areas of the Act in which the government has waived sovereign immunity. *McKinney v. City of Gainesville*, 814 S.W.2d 862, 865 (Tex. App. – Fort Worth 1991, no writ). The inclusion of police and fire protection within §101.0215 does not mean that governmental immunity is waived under the Texas Torts Claims Act per se for actions within that category, nor can the statutory section be interpreted so broadly as to create a determinative list of "state action" for §1983 purposes. To do so would not only implicate §1983 liability for all activities listed – including the operation of hospitals, parks, museums, cemeteries, libraries, senior citizen centers, recreational

facilities and parking facilities (all of which can be operated on a private basis in the state of Texas without the delegation of governmental responsibility) – but would also place the statute in square contradiction with the Local Government Code which makes the provision of fire protection optional for home-rule municipalities.

No Texas case has held that the provision of fire protection services is an exclusive function of a Texas home-rule municipality such as the City of McGregor. The cases relied upon by the Petitioners do not stand for such a proposition; they either do not mention fire protection at all or merely acknowledge that under the specific factual situations, the provision of fire protection is well within the police powers of a municipality or city in Texas.[3]

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[3] *See, e.g. City of Houston v. Southwest Concrete Const., Inc.*, 835 S.W.2d 728 (Tex. App. – Houston [14th Dist.] 1992, no writ) (fire protection not mentioned in text); *Genzer v. City of Mission*, 666 S.W.2d 116 (Tex. App. – Corpus Christi 1983, writ ref'd n.r.e.) (members of the volunteer fire department served in a governmental capacity under article 9205 of the Texas Revised Civil Statutes (now repealed) to the extent they worked under the supervision of the local police department and the fire chief, an employee of the City of Mission); *City of Coleman v. Rhone*, 222 S.W.2d 646 (Tex. Civ. App. – Eastland 1949, writ ref'd) (interpreting city ordinance regarding access to street from local fire station based upon the city's inherent police powers); *City of McAllen v. Morris*, 217 S.W.2d 875 (Tex. Civ. App. – San Antonio 1948, writ ref'd) (no discussion of whether fire protection is an exclusive governmental function of the city or the impact of §342.011 of the Texas Local Government Code or its predecessor statute); *City of Crosbyton v. Texas-New Mexico Util. Co.*, 157 S.W.2d 418 (Tex.Civ. App. – Amarillo 1941, writ ref'd w.o.m.) (fire protection not mentioned in text).

3. Fifth Circuit Precedent

The Fifth Circuit cases cited by the Petitioners do not state that fire prevention and protection is an exclusive governmental function of the City, nor were any of the cases decided in the context of a §1983 cause of action.[4] None of the decisions address the Texas legislature's language in the Local Government Code that home-rule municipalities like the City of McGregor may provide fire protection at their option, and none conflict with the Fifth Circuit panel's opinion in this case. The Fifth Circuit simply has not made a determination in prior cases which conflicts with the present opinion.

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[4] *Wilcox v. Terrytown Fifth Dist. Volunteer Fire Dept. Inc.*, 897 F.2d 765 (5th Cir. 1990) (Louisiana volunteer fire department considered a public agency for purposes of the FLSA under the specific facts of the case because the department was required to submit its annual financial report to the parish for inclusion in the parish annual budget, and under the terms of its contract with the parish was directly under the governing authority of the Jefferson Parish Council); *San Antonio Metro. Transit Auth. v. McLaughlin*, 876 F.2d 441 (5th Cir. 1989) (fire protection not discussed in opinion concerning the recoverability of attorney's fees by a litigant in an action under the FLSA); *Garcia v. San Antonio Metro. Transit Auth.*, 838 F.2d 1411 (5th Cir. 1988) (issue on appeal after remand was whether the Supreme Court's opinion in *Garcia v. San Antonio Metro. Transit Auth.* should be retroactively applied); and *Peel v. Florida Dept. of Transp.*, 600 F.2d 1070 (5th Cir. 1979) (determining whether an employee of the Florida Department of Transportation, an agency of the state, could bring suit against the DOT for violation of the Veteran's Reemployment Rights Act).

4. *Janusaitis v. Middlebury Volunteer Fire Department*

Finally, as noted by the Fifth Circuit, Petitioners' reliance upon *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17 (2nd Cir. 1979) is misplaced because the case is both factually and legally distinct from the present situation. The closest analogy of *Janusaitis* to this case is the court's ruling that upon balancing the plaintiff's abrasive and personally motivated conduct against the particular need for close and harmonious relations among the members of the volunteer fire department, the dismissal did not violate the plaintiff's First Amendment rights. The District Court in this case correctly premised its opinion upon a similar analysis.

The Second Circuit determined that the volunteer fire department involved in *Janusaitis* was a state actor based upon an analysis of several Connecticut statutes which differ markedly from §342.011 of the Texas Local Government Code. Additionally, the Town Board of Selectmen had the final vote of approval over some of the personnel of the department. *607 F.2d at 21-22.* And, as noted by the Fifth Circuit, the Second Circuit's determination that the volunteer fire department carried out an exclusive function of government was decided prior to *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) and *Rendell-Baker*, 457 U.S. 830. Furthermore, the ambiguity of the legal rationale used by the Second Circuit has rendered its subsequent application problematic. *(See Petitioners' Exhibit A at 12-13 and n. 6).* *Janusaitis* is indeed "less than compelling precedent" to apply to the

McGregor Volunteer Fire Department. *(Petitioners' Exhibit A at 13).*

5. Summary

The Fifth Circuit correctly held that under the facts and the law applicable to this case, fire protection is not an exclusive governmental function to be imposed upon the City of McGregor, a home-rule municipality under the laws of the State of Texas, and that the MVFD is not a state actor for purposes of the Petitioners' suit under §1983. Furthermore, as noted by the appellate court, the MVFD would not be deemed to be a state actor under any *other* formulas developed by this Court. (*Petitioners' Exhibit A at 13, citing Jackson*, 419 U.S. at 351; *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 556, 107 S.Ct. 2971, 2991, 97 L.Ed.2d 427, 460-61 (1987) (Brennan, J. dissenting)). The MVFD was not a state actor and the Fifth Circuit correctly affirmed the summary judgment granted by the district court in the department's favor.

CONCLUSION AND PRAYER

The McGregor Volunteer Fire Department, a volunteer organization of individuals, chose to revoke the membership of four persons whose conduct had seriously jeopardized the atmosphere of discipline and camaraderie so essential to the functioning of a fire-fighting team. Consequently, the City of McGregor, the MVFD and

members of the department found themselves as defendants in a lawsuit alleging violations of the Petitioners' constitutional rights. Under Texas law, the City of McGregor was not required to provide fire protection, and the MVFD's fire protection activities cannot be fairly characterized under the uncontroverted evidence of this case as an exclusive governmental function of the City of McGregor, Texas. No state action was implicated when the majority membership of the volunteer fire department voted overwhelmingly to remove the unwelcome influence of the Petitioners from their ranks. The Fifth Circuit properly affirmed the summary judgments granted by the District Court of the Western District of Texas and correctly held that the Petitioners did not raise a fact issue supporting their assertion that the MVFD was a state actor or an agency of the City of McGregor.

Under any set of guidelines used by this Court for deciding whether to exercise its judicial discretion and grant review on writ of certiorari, this case does not warrant such review. The Petitioners fail to demonstrate the existence of any issue worthy of writ of certiorari from this Court. The district court's granting of the defendants' motions for summary judgment was proper, and the Fifth Circuit correctly affirmed that judgment. Accordingly, the McGregor Volunteer Fire Department, Respondent, asks this Court to deny the petition for a

writ of certiorari, and further requests all other relief to which it may be entitled.

June 25, 1993.

Respectfully submitted,

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Supreme Court, U.S.
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No. 92-1936

In The

Supreme Court of the United States

October Term, 1992

FRANKLIN YEAGER, WALTER BRANDT, DON C. YEAGER, AND MARK YEAGER,

Petitioners,

v.

CITY OF McGREGOR, McGREGOR VOLUNTEER FIRE DEPARTMENT, AND TOM KIRK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Tom Kirk, Defendant/Appellee in the courts below, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Franklin Yeager, Walter Brandt, Don C. Yeager and Mark Yeager ("the Petitioners"), and requests that this Court deny the petition and decline to review the judgment and opinion of the

United States Court of Appeals for the Fifth Circuit that was entered on January 5, 1993.

STATEMENT OF THE CASE

A. Statement of Facts

Tom Kirk, Respondent herein, was a city council member and private citizen in the City of McGregor, Texas. He was not a member of the McGregor Volunteer Fire Department (VFD) nor did he hold any offices with the VFD or have anything to do with it. Despite the fact that he had nothing to do with the VFD, he was sued by the Petitioners herein when they were dismissed by vote of the membership of the VFD.

On November 19, 1988 Franklin Yeager, Walter Brandt, and Don C. Yeager told a newspaper reporter that the VFD engaged in racially discriminatory practices. (TR- Vol. 4; Exh. 5, p. 56, line 13-p. 59, line 18).[1] On December 1, 1988 the Petitioners appeared at a public meeting of the McGregor City Council to raise questions concerning claimed financial irregularities existing within the VFD. The minutes of the meeting show that City Councilman Tom Kirk, rather than attempt to cover up any claimed improprieties of the City or the VFD,

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[1] The references to Volume 4 of the record contain no page numbers, because Volume 4 consists primarily of a Motion for Summary Judgment and Response thereto. Each of those documents contains several exhibits. Because Volume 4 of the record is not paginated, reference is made herein to the Exhibits and their specific pages if possible.

responded to these questions by asking that the City of McGregor provide the services of the city auditor to conduct an audit of the records of the VFD for the previous five years. (TR- Vol. 4; Exh. 1 pp. 2-3). As pointed out by the District Court, these claimed improprieties dealt with the non-use, rather than the misuse of VFD funds. Petition, Appendix B, at 6.

The *only* alleged action shown by evidence in the record and attributable to Kirk followed this meeting. It consists solely of a remark allegedly made by Kirk to Ronnie Spradley and John Blake – "I want them out." Kirk testified under oath that he did not make any comments after the meeting about removing the Plaintiffs from the VFD. (TR- Vol 2; p. 338). This is borne out by the depositions and affidavits of Blake (Fire Chief) and Spradley (President of VFD). (TR- Vol. 4, Exh. 8, pp. 39-40; Vol. 4, Exh. 2; Vol. 4, Exh. 1). Hank Smith, however, allegedly heard Tom Kirk, immediately following the City Council meeting, state "I want them out." (TR- Vol 2; p. 338).[2]

After the adjournment of the city council meeting on December 1, 1988, a quorum of members of the VFD (which did *not* include Tom Kirk, since he was not a member) convened for a specially called meeting. Kirk

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[2] The only other evidence in the record to which Petitioners point concerning Kirk is a group of double hearsay statements by different participants in a Thanksgiving Day dinner, all reciting their own versions of the same visit. This consisted of the claim by some Petitioners and family of a conversation with Ronnie Spradley in which he indicated that Kirk wanted to see them out of the VFD.

did not attend, speak, or vote at this meeting. At the meeting, a motion was made by a member to dismiss Walter Brandt, Don C. Yeager, Franklin Yeager, and Mark Yeager. The motion was seconded and overwhelmingly carried a secret ballot vote of the membership. (TR- Vol. 4; Exh. 7). Tom Kirk was not a member of the VFD, was not at that meeting, had no standing to vote, had no control over the proceedings, did not buttonhole members, or address the group. (TR- Vol. 2; pp. 346-47) (TR- Vol. 4; Exh. 3).

There is no evidence to the contrary. Nonetheless, because of Petitioners' animosity towards him, Kirk, individually, was a target of this suit along with the VFD, the City of McGregor and Spradley (VFD President) and Blake (Fire Chief).

B. Course of Proceedings and Disposition in the Court Below.

Franklin Yeager, Walter Brandt, Don C. Yeager, and Mark Yeager, Petitioners herein, filed a Complaint in the United States District Court, alleging that they had been discharged from the VFD because of public statements they made concerning claimed racial discrimination and financial irregularity within the VFD.

After a significant amount of discovery was conducted, the City of McGregor, VFD, and Tom Kirk each filed Motions for Summary Judgment. (TR- Vol. 2; pp. 309-360). Defendants Blake and Spradley, the alleged co-conspirators with Kirk, were dismissed by agreement of Petitioners. The Motions for Summary Judgment were

properly granted by the District Court. (TR- Vol. 1; pp. 659-670).

Petitioners claim that as to Kirk, this decision rested solely upon the State Actor status of the VFD. Petition at 6. Contrary to that assertion, the District Court's Judgment in favor of Tom Kirk rested upon the fact that Kirk was not a member or official of VFD, and no evidence in the record showed that any action of his proximately caused the dismissal of Petitioners. "More importantly, the *only* action attributed to Defendant Kirk is the statement 'I want them out.' Petitioners have failed to present summary judgment evidence that this action caused their injury." District Court Opinion, Petition Appendix B, at 10. The Fifth Circuit Court of Appeals properly affirmed this judgment of the District Court.

SUMMARY OF THE ARGUMENT

A. No Genuine Issue of Material Fact Shown.

As pointed out by the District Court and the Fifth Circuit, the Petitioners in the case at bar completely failed to establish any connection between the claimed activity of Tom Kirk and the injuries or damages they alleged. Again, the only alleged act of Tom Kirk supported in the record by non-hearsay evidence is the one statement attributed to him that he wanted Petitioners out of the VFD. Kirk stated by deposition that the statement was never made, and that fact was confirmed by Blake and Spradley. (TR- Vol. 1; p. 665).

At best, the Petitioners can only create an issue of fact as to whether or not the statement was made. Even assuming that Kirk did make the statement that he wanted them "out," it was merely an expression of his opinion. There is no showing in the record that Kirk had any control over the membership of the VFD, and it was a separate entity in which he was not a member and had no right to vote.

B. Tom Kirk Caused No Damages.

The Petitioners have wholly failed to establish any causal connection between the claimed statement by Kirk and their injuries. Tom Kirk was not an officer or member of the VFD, was not present at the meeting of the VFD in which the Petitioners were voted out, nor would he have been allowed to cast a vote at that meeting. That was a privilege open only to the members of the VFD. The Petitioners were voted out of the Fire Department by an overwhelming majority of its own members. The two people Kirk allegedly talked to, Spradley and Blake, each possessed only one vote, and one did not even vote. (TR-Vol. 4; Exh. 1, 2, 3). Even if Blake had voted *for* the Petitioners remaining in the VFD, the vast majority of the other members would have removed them. (TR- Vol. 4; Exh. 3). Tom Kirk clearly did not cause the Petitioners' dismissal from the VFD and cannot be held liable for it.

C. There is No Evidence of Any Conspiracy.

In this case, there is no evidence of any agreement, or of any acts in furtherance of such an agreement. Further,

this case is very analogous to the Fifth Circuit's opinion in *Mylett v. Jeane*, 879 F.2d 1272 (5th Cir. 1989) and also to the shoplifter arrest conspiracy cases. In *Mylett*, and in the shoplifter conspiracy cases, the Courts have held that the providing of information (which is essentially the claim herein) is not sufficient to establish any type of "conspiracy" with state actors on the part of the private citizen.

D. Kirk's Statement Protected by Free Speech.

Even assuming that Kirk made the statement claimed by the Petitioners, that is the only action complained of by Kirk and it is not sufficient to support a claim for § 1983 conspiracy. Kirk has the same First Amendment right as Petitioners, and is free to suggest his opinions or views to those in the VFD, just as Petitioners. Expression of his views is accordingly protected by the First Amendment, and no § 1983 liability can rest upon that expression of his opinion and wishes.

ARGUMENT AND AUTHORITIES

The sole basis of Petitioners for urging the claims against Kirk is that of an unsupported broad brush claim of "conspiracy." For the reasons set out below, the District Court properly granted summary judgment for Kirk, and that judgment was properly affirmed by the Fifth Circuit.

A. Summary Judgment for Kirk Properly Granted.

A party seeking summary judgment must demonstrate that there is no actual dispute as to any material fact or element of the cause of action or defense upon which it is sought. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrette*, 477 U.S. 317 (1986). In this case, there is no material issue of fact as to any question of liability or causation concerning Kirk. Once Kirk demonstrated the absence of a material fact issue, the Petitioners had a duty to raise factual assertions that would preclude the granting of summary judgment. *Celotex*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As shown by the record, they completely failed to do so. For this reason, the Petition for Writ of Certiorari contains very little guidance to support Kirk's presence as a Defendant in the suit, and in this Appeal.

There is no evidence that establishes any control by Kirk over VFD actions. Instead, the evidence conclusively shows Kirk had no control over the members of the VFD when they voted to dismiss Petitioners at a meeting that Kirk did not attend. Nonetheless, they sued him because of that dismissal. Summary judgment was properly granted as to Kirk.

B. No Damages or Injury Proximately Caused by Kirk.

Petitioners were not employees of the City of McGregor, nor were they employees of the VFD. The Fire Department in McGregor is nothing more than what its name implies, a volunteer fire department. Petitioners

became associated with the VFD just as all other members – through an application, and acceptance by vote of the general membership. The procedural operations of the VFD are dictated by the charter and/or bylaws of the VFD. The bylaws provide for the disassociation of any member from the VFD by a vote of the membership. Petitioners were not voted out of the VFD by any single person, but by a vote of its general membership. Kirk was not ever a member of the VFD, nor was he present at the December 1, 1988 meeting. There is no evidence that Tom Kirk had any control over the voting of the general membership of the VFD. The Fire Chief and the President of the VFD (to whom he supposedly spoke) did not control or dictate the voting of the general membership. They each had just one vote. The Fire Chief and President of the VFD could neither hire, nor fire, members of the department. Under the VFD bylaws, that function belongs solely to the general membership of the VFD, and is executed, as in this case, by way of their voting. (TR- Vol. 4; Exh. 3). The act of disassociating the Respondents from the VFD was *solely* the act of the voting membership of the VFD. Tom Kirk could not, and did not, participate in that vote, nor did he attend the meeting in which there was a vote. (TR- Vol. 4; Exh. 1, 2, 3).

Accordingly, as correctly pointed out by both the District Court and Fifth Circuit there is no evidence of any causal connection between the alleged comment by Kirk, any activity of the leadership of the VFD, or the vote of the membership of the VFD. A person without the power to cause an improper state action cannot be held liable for that state action. *Morgan v. Tice; Morgan v. Whitt*, 862 F.2d 1495 (11th Cir. 1989). VFD President Spradley

has testified that he did not vote on the occasion in question. Fire Chief Blake only possessed one vote. Even if Blake had voted against dismissal, the overwhelming majority of the rank and file membership of the VFD voted to disassociate the Petitioners. The facts at bar do not even begin to approach actionable conduct by Kirk, let alone proximate causation.[3] Before Kirk can be liable under § 1983, there must be some proof of causation. The alleged injuries of the Petitioners could only have been caused by the membership of the VFD, through its voting. The District Court, recognizing this fact, stated as to Kirk that:

> the *only* action attributed to Respondent Kirk is the statement "I want them out". Petitioners have failed to present summary judgment evidence that this action caused their injury.

Petition, Appendix B, at 10. Under the facts of this case Tom Kirk did not cause any damage to the Petitioners, nor did he have the power to cause any such damage, as a matter of law. Petitioners presented no summary judgment evidence to the contrary.

C. There Is No Evidence Of Any Conspiracy.

The Petitioners have produced *no* evidence to support the claims of conspiracy to deprive the Petitioners of their civil rights between Kirk, Fire Chief Blake, and VFD

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[3] *Neubauer v. City of McAllen, Texas*, 766 F.2d 1567, 1577 (5th Cir. 1985); *Bowen v. Watkins*, 669 F.2d 979, 985 (5th Cir. 1982); *Reimer v. Smith*, 663 F.2d 1316, 1322 (Note 4) (5th Cir. 1981); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 610 (8th Cir. 1980).

President Spradley. In fact, despite this claim of conspiracy Blake and Spradley were voluntarily dismissed from this lawsuit by the Petitioners. (TR- Vol. 1; p. 660). Even though Petitioners make reference to *Dennis v. Sparks*, they fail to note that the conspiracy claim therein was based upon a "corrupt" act by the private individual – that of bribing a judge. That is certainly not the case here, and there is *no* evidence on the record of any such type of corrupt behavior or influence on the part of Kirk. *See Video International Production v. Warner-Amex Cable Com.*, 858 F.2d at 1075, 1084 (5th Cir. 1988).

The Petitioners have failed to properly and sufficiently plead and prove a conspiracy claim under § 1983. Conspiracy claims under § 1983 require a "heightened pleading standard demanding special particularity in civil rights complaints." *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. den'd*, 470 U.S. 1084 (1985). The *Hobson* court quoted with approval the Second Circuit's pleading requirement for such actions:

> Complaints containing only "conclusory," "vague," or "general allegations," of a conspiracy to deprive a person of constitutional rights will be dismissed . . . [as] diffused and expansive allegations are insufficient. . . .

Hobson, 737 F.2d at 4, quoting *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977); *see also Martin v. Malhoyt*, 830 F.2d 237, 258 (D.C. Cir. 1987). In the case at bar, the Petitioners' allegations and alleged "proof" of conspiracy against Kirk are conclusory at best. There has been no offering of any competent evidence of any conspiracy involving Kirk, nor does the Petition reveal any basis for that claim.

Petitioners must show by competent evidence *an agreement to conspire*. *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979). There was no such agreement, nor is there any evidence of such an agreement in this case. Any opinion expressed by Kirk can in no way constitute the requisite agreement to conspire. *Mylett*, 879 F.2d 1272 (§ 1983 conspiracy suit against co-worker for urging firing dismissed because no basis for § 1983 conspiracy). Furthermore, Kirk's comment alone is not sufficient in and of itself to show a participation in any conspiracy. *Id.*, *Buschi v. Kirven*, 755 F.2d 1240, 1249 (4th Cir. 1985). In *Buschi*, the mere fact that the individual Defendant commented to others that the Plaintiff "should be disciplined" was not sufficient to support a conspiracy claim, even in light of the Plaintiff's claims therein of subsequent unfair treatment. *Buschi*, 755 F.2d 1249.

Shoplifter arrest conspiracy cases are also analogous. In those cases, courts have repeatedly held that when a private store owner swears out a complaint against another individual and that individual is picked up and arrested, the private store owner has no § 1983 conspiracy liability under ordinary circumstances.[4]

In both *Mylett*, and in the shopkeeper cases, the logic for not holding the private individual liable under the conspiracy theory is that the reporting of information by the private individual does not take away the discretion and the voluntary actions of the governmental unit given

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[4] *See Bartholomew v. Lee*, 889 F.2d 62 (5th Cir. 1989); *Simms v. Jefferson Downs Racing Association*, 778 F.2d 1068, 1078-79 (5th Cir. 1985); *Daniel v. Ferguson*, 839 F.2d 1124 (5th Cir. 1988); *Storie v. U.S.*, 629 F.Supp. 1174 (N.D.Miss. 1986).

the information, as that unit is either free to act or not act upon that information.

Accordingly, Kirk should not be treated less well than the Defendant Adams in *Mylett*, or the private shopkeepers (that send people to jail) in the merchant cases.

D. Kirk Enjoys Same Right of Free Speech as Petitioners.

Just as any other individual in the community, Kirk is entitled to possess and express opinions concerning local government issues and local organizations. The membership of the VFD may credit or discount any or all of the opinions offered to them. In this regard, Tom Kirk should not be singled out and treated any differently than any other citizen in McGregor. The expression of political or personal opinions of state actors are not actionable under § 1983. *Thomas v. News World Communications*, 681 F.Supp. 55 (D.C. 1988). The Petitioners claim that the VFD is a governmental entity and that Blake and Spradley are state actors. Assuming that to be true, without admitting the same, even if Kirk did express his opinions to them, it was an attempt on his part to petition his "government," which is protected speech. *Eastern Railroads President Conference v. Noerr Motor Freight Incorporation*, 365 U.S. 875 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

The *Noerr-Pennington* Doctrine also applies to § 1983 claims. *Warner-Amex*, 858 F.2d 1075. The mere petitioning of the government, as Kirk's alleged act here, is not sufficient to support a claim or submission of conspiracy. Rather, that type of corrupt activity as evidenced in

Dennis v. Sparks, 449 U.S. 24 (1980), is necessary to turn First Amendment petitioning into a § 1983 conspiracy. *Warner-Amex*, 858 F.2d at 1084. In *Dennis*, the important element that constituted the conversion of the private actors into § 1983 conspirators was the "corrupt conspiracy involving bribery of a judge." *Dennis*, 101 S.Ct. at 186; *Warner-Amex*, 858 F.2d at 1084. Here, as in *Warner-Amex*, there is not sufficient evidence in the record of any such corrupt conspiracy to require the denial to Kirk of the protection of the *Noerr-Pennington* Doctrine. Because the only activity complained of on the part of Kirk is *his* exercise of free speech rights, any liability based thereupon should be approached "with extreme care". *NAACP v. Claiborne Hardware Co.*, 458 U.S. 86 (1982).

CONCLUSION AND PRAYER

Tom Kirk, a private citizen, allegedly did only one thing wrong, and that was utter the single statement that he wanted Petitioners "out" of the VFD. There is no other evidence in the record that intimates or shows that the Petitioners' ultimate dismissal from the VFD was the result of anything Tom Kirk did, or the result of any § 1983 conspiracy, as claimed. Accordingly, the Fifth Circuit properly affirmed the summary judgment granted by the District Court of the Western District of Texas and correctly held that the Petitioners did not raise a fact issue supporting their assertion Kirk was a co-conspirator with state actors, and did not cause any damage to Petitioners.

Under any set of guidelines used by this Court for deciding whether to exercise its judicial discretion and grant review on writ of certiorari, this case does not warrant such review, as it is solely a factual determination of the prior courts based upon Petitioners' inability to present a viable factual claim in the Summary Judgment record. The Petitioners fail to demonstrate the existence of any issue worthy of writ of certiorari from this Court. The district court's granting of the Defendants' Motions for Summary Judgment was proper, and the Fifth Circuit correctly affirmed that judgment. Accordingly, Tom Kirk, Respondent, asks this Court to deny the petition for a writ of certiorari, and further requests all other relief to which he may be entitled.

June 29, 1993.

Respectfully submitted,

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